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YEAR 1950

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BY
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PREFACE

The present volume marks a change—which is of a less drastic nature than the alteration of the title would seem to suggest—in the history of this publication. This Series, which first appeared in 1929 as the *Annual Digest of Public International Law Cases* and which in 1940 was renamed *Annual Digest and Reports of Public International Law Cases*, appears now and will in the future appear as *International Law Reports*. The change adopted in 1940 was intended to give effect to a policy which aimed at the gradual transformation into full reports of what started as a digest of decisions of international courts and tribunals and of national courts applying public international law. That aim can now be regarded as achieved. The year 1950 seems a proper date for registering, through an express change in the title of the publication, the development thus accomplished. It is fitting that international law should possess a regular series of reports not only in substance but also in name.

It has been thought desirable to preserve the form of the reports as reproduced in the past, in particular their division into *Facts* and *Held*. The *Facts* include not only the factual basis of the case, but also the legal contentions of the parties—a method which is intended to assist the reader from the outset in gauging the nature and the importance of the legal issues involved in the case. As in the past, the *Held*, before reproducing the decision verbatim, usually states briefly the effect of and the principle upon which the decision is based. Apart from that, the judgment is as a rule transcribed, or translated, in full in so far as it is relevant to any question of international law decided by it. In the case of decisions given in a language other than English, the policy has been, and will continue, to give as literal a translation as possible and thus to preserve the original character of the decision, even if occasionally the literal translation may create the impression of a rendering which is somewhat artificial. It is not easy—and probably not desirable—to avoid that impression. There exist in the administration of justice in various countries differences in terminology, in method, and in the mental processes of arriving at a decision. The preservation of these differences adds to both the interest and the usefulness of the *International Law Reports*. It would serve no useful purpose to attempt to attenuate them for the sake of a superficial uniformity of expression. What is of greater, and decisive, importance is that behind the divergencies of method, language, and procedure, there reveals itself more often than not a general consensus of approach and attitude which testifies to the vitality and the unifying influence of the law of nations throughout the world.

The present volume, which covers the year 1950, is being published in 1956. Steps are now being taken to publish in 1957 four volumes covering the years 1951 to 1954, and in 1958 two further volumes covering the years 1955 and 1956. The accomplishment of this object would bring the *International Law Reports* up to date as far as is feasible having regard to the considerable time-lag in the availability of reports from various countries and to the exigencies of printing. In future every effort will be made to reduce the time-lag to a minimum.

Moreover, I cherish the larger hope that we may be able before long to retrace our steps and publish a series of volumes of the *International Law Reports* for the long period between the inception of modern international case law and 1918 (the period covered by the *Annual Digest* begins in 1919). This is at present no more than a hope, and it is therefore not necessary to resolve now the difficulty of deciding which of two crucial dates should be regarded as marking the beginning of modern international case law. One of these is the year 1764, when, in the case of *Triquest* v. *Bath*, Lord Mansfield first judicially affirmed the unity of municipal law and the law of nations—a unity expressed in the notion that international law is part of the law of the land. That notion, whose validity has been fully accepted by courts in the United States, constitutes one of the most significant contributions of the common law to the practice and the doctrine of international law. The second possible date is the year 1794. In that year Great Britain and the United States of America concluded the Jay Treaty which marks the commencement of a long and sustained practice of arbitral settlement between the two countries and, with it, the commencement of the true growth of international arbitration. A series of international law reports going back to one of these two dates would, I believe, be of inestimable practical and scientific value. It would also give fitting expression to a significant aspect of the judicial tradition of the common law countries and of its influence, in this respect, upon the judicial practice of many other countries. Above all, it would complete the task of placing at the disposal of Governments as well as of the scholar and the practitioner the entire *corpus juris* of international law in so far as it is embodied in judicial and arbitral decisions. More than a quarter of a century has now elapsed since the first volume of the *Annual Digest of Public International Law Cases* appeared. Experience has fully confirmed, in the words of the Preface to that volume, " the suspicion that there is more international law in existence and daily accumulating ' than this world dreams of ' and the conviction that it is more international law that this world wants ".

The decision to bridge the existing gap and thus to make possible the publication of the *International Law Reports* within the necessary time limits has been made practicable largely through the generosity of the Ford Foundation, which has put at the disposal of the Advisory Committee a substantial grant for a limited period of years. The Advisory Committee and the Editor take this opportunity of expressing their warm thanks to the Foundation. This is also the place for gratefully acknowledging grants made, for the purpose of expanding the Series, by the Trustees of the International Law Fund and by the Trustees of the Humanitarian Trust Studentship in International Law in the University of Cambridge.

In preparing both the present volume and the plans for the future development of the *International Law Reports* I have relied on the constant advice and encouragement of Lord McNair, Chairman of the Advisory Committee, who was Joint Editor with me of the first volumes of the *Annual Digest* and who has been closely associated with its work throughout the entire period of its activity.

To the Contributors—the true authors of this and other volumes—a list of whose names appears in the forefront of the volume, I am deeply grateful for the devotion with which they fulfil what is substantially a labour of love involving not only wide and painstaking research but also, frequently, the laborious task of translation.

My grateful thanks are due to Dr. F. Honig who, in addition to his extensive and valuable work as contributor, read the proof and rendered other assistance in seeing the volume through the press ; to Mr. D. J. Latham Brown, LL.B., for his part in reading the proof ; and to Mr. A. B. Lyons, M.A., LL.B., for his generous assistance in revising many of the cases and in preparing the Index. Mrs. Gladys Lyons, B.Sc. (Econ.), has—as in the past—read the proof and seen the volume through the press in all stages. She also prepared the Tables of Cases and helped to conduct a great deal of correspondence. I am grateful to her for her able and devoted help. I am also indebted to Mrs. E. E. Jansen, who has borne the brunt of the secretarial work, and to Mr. C. J. Staines for patient clerical assistance.

Finally, I desire to express my thanks to Messrs. Butterworth & Co., the Publishers, and to Messrs. R. & R. Clark, the Printers, for their unfailing courtesy and efficiency.

H. LAUTERPACHT

THE PEACE PALACE,
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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A. (or Atl.) = Atlantic Reporter (United States).
A.C. = British House of Lords and Judicial Committee of the Privy Council.
A.D. = Supreme Court of the Union of South Africa, Appellate Division.
A.I.R. = The All India Reporter.
All E.R. = The All England Law Reports.
A.L.R. 2d = American Law Reports, Second Series.
Annual Digest = Annual Digest [and Reports] of Public International Law Cases.
App. Div. = Supreme Court Reports (New York), Appellate Division.
B.G. = Bundesgericht.
B.G.E. = Entscheidungen des Bundesgerichts.
Can. C.C. = Canadian Criminal Cases.
C.A. (U.S.C.) (A.H.C.) = Court of Appeals, United States Courts of the Allied High Commission for Germany (from vol. VII (January 1950) onwards).
C.A. (USMG) = Court of Appeals of the United States Military Government in Germany (vols. I–VI).
CC.Cr.App.R. = Control Commission Criminal Appeal Reports.
C. (or Ch.) Rob. = C. Robinson's Admiralty Reports (1799–1808).
Ch. App. Cases = Law Reports: Appeal Cases, Chancery Division.
Ch. (or Ch.D.) = Chancery Division of the English High Court of Justice.
Clunet = Clunet, Journal du Droit international.
C.P.A. = Civil Procedure Act.
C.P.D. = Supreme Court of the Union of South Africa, Cape Provincial Division.
Dalloz = Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz).
D.L.R. = Dominion Law Reports (Canada).
Dods. = Dodson's Admiralty Reports (1811–22).
Edw. = Edward's Admiralty Reports (1808–12).
Eq. = Law Reports: Equity.
Ev. Bl. = Evidenzblatt der Österreichischen Juristenzeitung.
F. (or Fed.) = Federal Reporter (United States).
F. 2d = Federal Reporter (Second Series).
F.C.R. = Federal Court Reports (India).
F. Supp. = Federal Supplement (United States).
Gaz. Pal. = Gazette du Palais (France).
H.K.L.R. = Hong Kong Law Reports.
H. of L. App. Cas. = House of Lords, Appeal Cases.

I.A. = Indian Appeals decided in the Judicial Committee of the Privy Council.
I.C.J. Reports = International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.
I.L.R. = India Law Reports.
J.Bl. = Juristische Blätter.
K.B. (or K.B.D.) = King's Bench Division of the English High Court of Justice.
L. Ed. = Supreme Court Reporter, Lawyers' Edition.
L.J.C. = Law Journal: Chancery.
L.J.M.C. = Law Journal Magistrates' Cases.
L.J.R. = Law Journal Reports.
Ll.L.Rep. = Lloyd's List Law Reports.
Ll. P. C. = Lloyd's Prize Cases.
L.N.T.S. = League of Nations Treaty Series.
L.R. = Law Reports (England).
L.T.[R.] = Law Times [Reports].
M.L.J. = Malayan Law Journal.
M.L.R. = Malayan Law Reports.
M.U.L.R. = Malayan Union Law Reports.
N.D.S. = Nordiske Dommer i Sjöfartssaker (Norway).
N.E. = Northeastern Reporter (United States).
N.J. = Nederlandse Jurisprudentie (Holland).
N.L.R. = Natal Law Reports.
N.O.R. = Na-oorlogse Rechtspraak (Holland).
N.P.D. = Supreme Court of the Union of South Africa, Natal Provincial Division.
N.W. = North Western Reporter (United States).
N.Y.S.[upp.] = New York Supplement.
Ob. = Oberster Gerichtshof (Austria).
OGHZ = Entscheidungen des Obersten Gerichtshofs für die britische Zone, Zivilsachen (Germany).
OJZ = Österreichische Juristenzeitung.
P. (or P.D.) = Probate, Divorce and Admiralty Division of the English High Court of Justice.
P.C.I.J. = Publications of the Permanent Court of International Justice: Reports of Judgments, Advisory Opinions, Orders, and other Acts and Documents.
Q.B. (or Q.B.D.) = Queen's Bench Division of the English High Court of Justice.
R.G.D.I.P. = Revue générale de Droit international public.
R.G.Z. = Entscheidungen des Reichsgerichts in Zivilsachen.
S.A.L.R. = South African Law Reports.
S.C.R. = Supreme Court Reports (Canada).
S.Ct. = Supreme Court Reporter (United States).
Sirey = Recueil général des Lois et des Arrêts (founded by Sirey).
SJZ = Süddeutsche Juristenzeitung.
S.R. & O. = Statutory Rules and Orders published by authority (England).
T.P.D. = Supreme Court of the Union of South Africa, Transvaal Provincial Division.

U.S. = United States Reporter (Supreme Court).
U.S.C.A. = United States Code Annotated.
VfGH = Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs (New Series) (Austria).
VwGH(A) = Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Administrative Law) (Austria).
VwGH(F) = Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Law relating to Finance) (Austria).

PART I

INTERNATIONAL LAW IN GENERAL

III.—Sources

[See also Part X, DISPUTES : A, II, i. ARBITRATION : *The Law Applied by Arbitral Tribunals.*]

International Law—Sources of—Customary International Law—Conditions of.

See Case No. 90 (*Asylum Case* (*Colombia/Peru*)).

IV.—Subjects of International Law

[See Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW : A, *In General* ; and Part VIII, TREATIES : *Operation and Enforcement of Treaties.*]

International Law—Subjects of—Liability for Negligence on the Part of Persons Employed by Authorities of Occupation.

See Case No. 131 (*British Army of Occupation* (*Road Accident*) *Case*).

V.—Relation to Municipal Law

[See also Part VIII, TREATIES : IX, *Operation and Enforcement of Treaties, Necessity for Municipal Legislation* ; and Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW : A, *In General.*]

Treaties—Whether Part of Municipal Law—Absence of Express Incorporation into Municipal Law—Indirect Reference in Order-in-Council—Property in United Kingdom of late King of Italy—Disposal by Custodian of Enemy Property Allegedly Contrary to Treaty—Whether a Treaty can Constitute a Trust.

Case No. 1

REPUBLIC OF ITALY *v.* HAMBROS BANK, LTD.,
AND GREGORY (CUSTODIAN OF ENEMY PROPERTY).

England, High Court of Justice, Chancery Division.
(Vaisey J.) *January* 25, 26 ; *February* 9, 1950.

THE FACTS.—A Financial Agreement concluded in Rome on April 17, 1947, between the Government of the United Kingdom and the Italian Government provided that the Custodian of Enemy Property should transfer Italian property

Case No. 1 *Contd.*

which he held to the Italian Government to be paid into a special account with the Bank of England for the payment of debts in the United Kingdom which were chargeable on Italian property. Since the outbreak of war with Italy in 1940 there was vested in the Custodian, amongst other property, the property in the United Kingdom of King Victor Emanuel III of Italy. In September 1947 the Peace Treaty with Italy came into force and in December 1947 King Victor Emanuel III died. In March 1949 letters of administration were granted to Hambros Bank, Ltd., as his attorney-administrators, and early in 1949 the Custodian, after paying death duties, paid and transferred the balance of the late King's property, at the direction of the Board of Trade, not into the special account with the Bank of England, but to Hambros Bank, Ltd.

In this action the Republic of Italy claimed a declaration that that payment and transfer were in breach of a trust or obligation to pay or apply it in accordance with the Financial Agreement; and also an injunction to restrain Hambros Bank, Ltd., from dealing with the property or any part of it otherwise than in accordance with that trust or obligation. Hambros Bank, Ltd., did not admit that the Financial Agreement was in any way binding on or enforceable against them; and the Custodian denied that it created any obligations or rights enforceable in the court, at the suit either of the Republic of Italy or of any other person or body. Further facts appear from the judgment of Vaisey J., below.

Held: that the Financial Agreement between the United Kingdom and Italy was not cognizable or justiciable in the municipal court. The action must therefore be dismissed.

Per Vaisey J.:

"I wish to say at the outset that what I know of this case (though my knowledge is admittedly imperfect) has not a little disturbed me, for it was hinted to me (or perhaps rather more than hinted) that there had been some misapprehension of fact (entertained by I know not whom) which had given rise to the transactions of which the Republic of Italy, the plaintiffs in this action, are complaining. I gather that some person or authority (not identified) had acted in the erroneous belief that the plaintiffs had either given their previous consent to those transactions, or could be safely assumed to be willing to accord their subsequent approval to those transactions.

"I desire, therefore, to express myself with reserve, and to confine my judgment to what I conceive to be the one and only issue before me, that is to say, whether the plaintiffs can in this court and in this action obtain as against the defendants the relief which they are seeking, or any part of such relief. Have the plaintiffs a cause of action? Are these proceedings maintainable? Or are they, in the time-honoured expression, ‘ frivolous and vexatious and an abuse of the process of the court ’ (words familiar in our legal phraseology, though they might appear to the uninstructed to be somewhat incongruous when applied to such a case as the present) ? I do not like even in appearance to attribute to the Republic of Italy, to those who direct its fortunes or to those who speak in its name, any feelings of, or even akin to, levity or disrespect, or to imply, however remotely, the existence of some possible impropriety in the method of their approach to this court. I would rather put the alternatives thus : is the action maintainable, or is it misconceived ?

“ The point seems indeed to be narrowed down to this, whether the terms of a certain agreement, arrangement or bargain made in Rome on April 17, 1947, between the Government of the United Kingdom, acting by His Majesty’s Ambassador there, and the Government of Italy, acting by the Count Sforza, its Foreign Secretary, which I may conveniently call ‘ the financial agreement ’, are or are not justiciable or cognizable in the courts of this country, as forming part of our municipal or domestic law ; or is it the outcome of a negotiation between high contracting parties, resulting in a treaty, placed apart from and above our general law, and so outside my ken and purview ? It was frankly admitted by their counsel that the plaintiffs’ rights, if any, arise out of the financial agreement and have no other source, and that, unless the former of the two alternative views which I have just formulated can be established, their case must necessarily fail.

“ The action concerns the private fortune in this country of the late King Victor Emanuel III of Italy, which is said to have amounted to some 1½ million pounds sterling in value. At the outbreak of the war between this country and Italy, that fortune, consisting partly of cash, partly of British Government securities, and partly of investments quoted on the London Stock Exchange, became vested in the Custodian of Enemy Property, the second defendant, under and for the purposes of the Trading with the Enemy Act, 1939, and the orders and regulations made thereunder.

“ On or about May 9, 1946, the late King (who is admitted to have been at all material times an ‘ Italian national ’) abdicated from his throne. On December 28, 1947, he died in exile. On March 5, 1949, letters of administration to his estate were granted out of the Principal Probate Registry to Hambros Bank, Ltd., the first defendants, as attorney-administrators. This action is brought by the plaintiffs, the Republic of Italy, against the bank and the custodian. There is no other party to the action.

“ On February 10, 1947, a Treaty of Peace between the United Kingdom and certain other powers on the one hand and Italy on the other hand was signed in Paris, and having been ratified by Italy on September 15, 1947, came into force on that day in accordance with its terms. This Treaty of Peace is a very lengthy document, but I need only refer to so much of art. 79 of it as empowered the United Kingdom to seize, retain, liquidate or take any other action with respect to all property, rights and interests which on the coming into force of the Peace Treaty were within its territory and belonged to Italy or to Italian nationals, and to apply such property or the proceeds thereof to such purposes as it might desire within the limits of its claims and those of its nationals (including certain debts), followed by a direction that all Italian property or the proceeds thereof in excess of the amount of such claims should be returned, meaning, I think, returned to the former owners of the property. Paragraph 2 of the said art. 79 provided that the liquidation and disposition of Italian property should be carried out so far as the United Kingdom was concerned in accordance with our law, and that the Italian owner should have no rights with respect to such property except those which might be given to him by our law.

" I now turn to the financial agreement which was entered into, as I have said, on April 17, 1947. It took effect, according to its terms, on the date of the ratification of the Peace Treaty by Italy, that is to say, on September 15, 1947. It is printed by His Majesty's Stationery Office as ' Treaty Series No. 31, 1947 '. It sets out the provisions of art. 79 of the Peace Treaty, and recites that the Italian Government, in consideration of the relinquishment by the United Kingdom Government of certain of the debts mentioned in that article, desired to provide funds in the United Kingdom for the payment of certain debts which had not been so relinquished. Its operative parts deal with the liquidation and disposal of Italian property (thereby defined as meaning all property which on the relevant date, that is, September 15, 1947, was held by, among others, the defendant custodian as belonging to Italy or Italian nationals), including, I should suppose, the property of the late King. It covered (*a*) Italian property consisting of liquid assets and (*b*) other Italian property. Liquid assets were to be transferred to the Italian Government to be utilized by them for the payment of the debts in this country with which Italian property was intended to be charged as I shall presently mention, and the Italian Government was to open an account, referred to as the Special Account, in the name of the Bank of Italy with the Bank of England into which the said liquid assets were to be paid. It would certainly seem that such of the late King's property as on September 15, 1947, consisted of cash in the hands of the custodian was liquid assets within the meaning and for the purposes of the financial agreement. As regards other Italian property, the financial agreement provided that it should at the request of the plaintiffs be realized and the net proceeds paid into the special account, with the object, so far as I can see, of increasing the amount available for the payment of the debts. The plaintiffs were to be liable for any deficit on the special account and were to be entitled to the free use of any surplus that might remain.

" The chronological order of events in this case is rather confusing, but I must next refer to the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, which received the Royal Assent on April 29, 1947. This Act empowered His Majesty to make Orders in Council to give effect to the said Peace Treaty. Accordingly, by the Treaty of Peace (Italy) Order, 1948, it was directed that the provisions of (among other things) art. 79 of the Peace Treaty should (so far as they were by their nature capable of doing so) be and have effect as law and that the property rights and interests therein mentioned (that is to say, the Italian property rights and interests referred to in the said article) should be charged with the claims (including debts) therein mentioned. The Order further provided that any such property rights and interests so charged might, under the direction of the Treasury —and I quote the exact words—' be transferred . . . free of any such charge . . . in accordance with the terms of any . . . agreement with the Government of Italy affecting the said property rights and interests to which His Majesty is or may be a party '.

" It is here, if anywhere, that the financial agreement is brought into and made part of the law of this country. But there are obvious difficulties about that view of the matter. In the first place, the words are permissive, not obligatory. Secondly, if the financial agreement was intended to be referred to, why was it not expressly mentioned ? Thirdly, is there any authority or principle which enables me to hold that a contract such as the financial agreement made between high contracting parties and having all the appearance of a treaty can be imported into and incorporated in our domestic law by mere vague allusion, when there would have been no difficulty at all in doing so expressly and when an obvious opportunity for doing so presented itself ?

" The points which seem to me to arise are these : first, did the financial agreement confer rights on the plaintiffs which are enforceable in this court ? Secondly, are those rights enforceable against the custodian ? Thirdly, are they enforceable against property in the hands of the defendant bank ? Unless the first of these questions is answered in the affirmative, the action fails in limine. In my judgment, the reported decisions contain nothing to support and everything to negative its being so answered. I have been referred to the following, among other cases : *In re Californian Fig Syrup Company's Trade Mark* (40 Ch.D. 620) ; *Salamon* v. *Secretary*

Case No. 1 Contd.

of State for India, [1906] 1 K.B. 613; *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67; *Civilian War Claimants' Association* v. *The King*, [1932] A.C. 14; and *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308. None of these authorities assists the plaintiffs in contending either that the financial agreement is not, in substance, a treaty or that I can, in such an action as this, take cognizance of it. It is to be observed that neither of the two defendants was a party to the financial agreement and that the British Government, which was a party to it, is not a party to this action.

"What happened was this: the custodian, admittedly in good faith, and acting under directions of the Board of Trade (as he was entitled and probably bound to do) but without the consent or approval of the plaintiffs, in the early months of the year 1949 parted with the whole of the late King's property. A sum of £78,248 was applied in purported satisfaction of a claim for the estate duty payable on the late King's death, and the balance was handed over to the defendant bank as the attorney-administrators of the late King's estate.

"The plaintiffs say that this was contrary to and inconsistent with the terms of the financial agreement and that they are prejudiced thereby by the increase *pro tanto* of their liability to meet any deficit on the special account and by the reduction of the amount of the surplus or possible surplus on that account. It certainly looks as if the plaintiffs were very closely concerned in the matter, having regard to the financial agreement, and I cannot understand why they were not consulted. The financial agreement appears to be still in operation. Was it forgotten or overlooked on this occasion?

"I end, as I began, in an atmosphere of some bewilderment. There must surely be some explanation of what is to me so inexplicable. Italy's entry into the war as an enemy of this country was a tragedy, and I cannot believe that the further, though minor, tragedy of a misunderstanding will be allowed to ensue now that peace is restored. Any person who has created or contributed to such a misunderstanding must have done (I should have thought) a grave disservice to both countries.

"I dismiss this action on the ground that the financial agreement is not cognizable or justiciable in this court, but it is only right that I should add that, even if it were, I doubt whether the necessary parties to any action to enforce its terms are before me. I shall make no order as to the costs, except to direct that the cost of taking the shorthand note of the two days' hearing and the provision of one transcript for my use should be divided equally, half and half, between the plaintiffs and the defendants."

[Reports: L.R. [1950] Ch. 314; 66 T.L.R. (Pt. I) 468; [1950] 1 All E.R. 430.]

International Law—Relation to Municipal Law—The Law of Holland—Relevance of Fact that the Interests Involved are Purely Dutch. **Case No. 2**

VAN WOUDENBERG *ET AL.* *v.* PETROLEUM INDUSTRIE MAATSCHAPPIJ, LTD.

Holland, Court of Appeal of The Hague (*by prorogation*).[1]
April 12, 1950.

Supreme Court. January 5, 1951.

THE FACTS.—The plaintiffs, heirs to an engineer who was the owner of a shipbuilding patent, applied for an injunction against the defendant Company prohibiting it from using the patent on one of its tankers without having previously obtained a licence from the plaintiffs. They also claimed damages. The defendant Company invoked a certain provision (Article 8) of the Netherlands Emergency Law on Industrial Property of 1947 (*Staatsblad* No. H-397) to justify its unlicensed use of the patent. The claimants alleged that the Law of 1947 was at variance with Article 1 of the " Protocole de clôture ", *juncto* the " Protocole de clôture additionnel " to the multilateral arrangement of Neuchâtel of February 8 of the same year concerning the conservation and the restoration of industrial property rights affected by the Second World War, and that it could not prevail over the Arrangement.[2]

Held (by the Court of Appeal): that an injunction must be refused. The Arrangement of Neuchâtel, being a so-called self-executing treaty and having become effective in Holland after the Emergency Law of 1947, must prevail over the latter in case of discrepancy. This was so even though both parties to the action were Dutch and the case concerned a Dutch vessel and a Dutch patent, because otherwise the defendant would be placed at a disadvantage in relation to foreigners protected by the Additional Final Protocol. In this case, however, both the Protocol and the Emergency Law were held to permit the use of the patent.

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[1] Jurisdiction " by prorogation " is jurisdiction exercised by an appellate court in the first instance without the normal proceedings in a lower court having taken place. Such a procedure can be adopted only in pursuance of an express agreement between the parties to that effect, to save time and costs.

[2] According to the " Protocole de clôture " (Article 1), there was made applicable to *patents* a separate " Protocole de clôture additionnel ": " Lorsque, durant la période comprise entre le 3 septembre 1939 et le 30 juin 1947, des produits revêtus d'une *marque* contrefaisant ou imitant une marque enregistrée dans un pays contractant ont été importés dans ce pays, au compte du Gouvernement, pour les fins de la poursuite efficace de la guerre, ou pour maintenir des approvisionnements et des services essentiels à la vie de la communauté, ou pour soulager des souffrances et des malheurs résultant de la guerre, un tel emploi de la marque ne sera pas considéré comme une atteinte aux droits de son propriétaire ". The Dutch Emergency Law reproduced this Article 1 of the " Protocole de clôture " in its essence, but in a wording which allowed of an interpretation according to which the use of the trade mark (patent) in Holland would be permissible no longer than until July 1, 1947 (in translation: " The importation and the subsequent use of goods in the period between September 3, 1939, and July 1, 1947, which encroached upon the right of the owner of a trade mark or a patent shall not be considered an infringement of this right if . . . etc.").

[Report : *N.J.*, 1951, No. 105.]

Held (in cassation) : that it did not appear that the legislature, when enacting the Emergency Law of 1947, had intended to depart from the Arrangement of Neuchâtel. On the contrary, it had given evidence of its intention to follow the Arrangement and Protocols as closely as possible.

[Report : *N.J.*, 1951, No. 69.]

Note.—The judgment in cassation is in line with the general policy of the Supreme Court of avoiding a definitive decision on the crucial question which must prevail in a case of irreconcilable contradiction between a Netherlands law and a treaty. The Procurator General admitted before the Supreme Court that the treaty must prevail. The following quotation is taken from his " conclusion " (legal opinion) :

> " First of all it must be held that international law, even when not springing from treaties or other binding international regulations, prevails over municipal law. Compare the elaborate argumentation of François, *Handboek van het Volkenrecht*, vol. I (2nd ed., 1949), pp. 44 *et seq.*; the judgment of the Special Court of Cassation in *In re Rauter* (*N.J.*, 1949, No. 87,[1] with a Note by Professor Röling), and the discussion and voting in the Netherlands Lawyers' Association on the point in question at its 1937 Session, on the basis of two preliminary reports by Professors Telders and Verzijl (*Handelingen Nederlandsche Juristenvereeniging*, 11 (1937), pp. 11–96). Should the relation between international law and municipal law be envisaged in the opposite way, the coming into existence of a true international order would be hindered. The Nuremberg and Tokyo judgments would likewise lose their basis, since the charge laid at the door of the German and Japanese statesmen and generals was essentially that they had placed their national legal order and the orders of their national authorities above international law and international moral order. Nor is it desirable to make an exception for legal relations obtaining exclusively in the national sphere, *i.e.* with regard to controversies arising between Dutch parties, since such an exception would also be detrimental to the international legal order and, moreover, would rank nationals lower than foreigners. In addition, a subsequent international treaty, in this case a treaty having become operative in the Netherlands after the coming into force of a Netherlands law though concluded prior to the enactment of that law, must in any event prevail over an earlier law."

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[1] See *Annual Digest*, 1949, Case No. 193.

Treaties—Relation to Municipal Law—Conflict between Treaty and Subsequent Municipal Law—Supremacy of Treaties—Treaty of Economic Union—Freedom of Trade within Union. **Case No. 3**

HUBERTY *v.* PUBLIC PROSECUTOR.

Luxemburg, High Court of Justice (Criminal Appeals).
June 8, 1950 ; *November* 16, 1950.

THE FACTS.—The appellant, who had imported Belgian eggs into the Grand Duchy of Luxemburg without taking the necessary steps to ensure that the eggs bore the imprint of their country of origin, was convicted of an offence under Article 6 of the Luxemburg decree of April 3, 1937, which provided that foreign eggs were to bear an indication of their country of origin. On appeal it was contended on his behalf that the decree in pursuance of which he had been convicted was unlawful as being in violation of Article 3 of the Belgo-Luxemburg Treaty of Economic Union of July 25, 1921, which provided that " there shall be full and complete freedom of trade, without any obstacles or prohibitions as to importation . . . between the two countries ", and that as the treaty took precedence of the municipal decree which was restrictive of " full freedom of trade ", he was entitled to be acquitted. On behalf of the Public Prosecutor, the respondent herein, it was contended that the Court was not entitled to enquire whether the decree was compatible with the treaty, the only duty of the Court being to apply municipal law.

Held : (1) that an international treaty takes precedence of municipal law, notwithstanding that the latter may have been enacted subsequently to the ratification of the treaty ;

(2) that the Court must accordingly determine whether the decree was compatible with the treaty ;

(3) that in the present case the Luxemburg decree of April 3, 1937, did not violate the Belgo-Luxemburg Treaty of Economic Union of July 25, 1921, seeing that a duty imposed upon importers to indicate on imported goods the country of origin did not constitute an obstacle to free trade as postulated in the treaty ;

(4) that, though the appeal must accordingly be dismissed, the appellant was entitled to the benefit of an amnesty which had meanwhile been promulgated. The Court said :

" The appellant, who was prosecuted for contravening the decree of April 3, 1937, which provides for the regulation of trading in eggs, contended that the said decree was unlawful as being in violation of Articles 3 and 9 of the Treaty of Economic Union concluded with Belgium, the said Articles providing that there shall be full and complete freedom of trade between the two countries, without any obstacle or prohibition as to importation. . . .

Case No. 3 *Contd.*

"The judgment under appeal held the said decree to be applicable to the appellant solely on the ground that it is a statute in the true sense and that it is not for the judge to determine whether it is in conformity with the obligations undertaken by the Grand Duchy in the execution of an international treaty. However, where there is a conflict between the provisions of an international treaty and the provisions of a municipal law enacted subsequently, the international treaty must take precedence of the municipal law. The trial judge failed, by reason of the above-mentioned finding, to deal with the objection against the decree of April 3, 1937, which was to the effect that the latter violated the provisions of the Treaty of Economic Union relied upon by the appellant. In so doing, the trial judge made it impossible for this Court to determine whether the law has been properly applied. It follows that the judgment under appeal is not justified in law, and that the appeal is well founded on this ground."

The appeal having been allowed and the judgment of the court of first instance having been quashed, the Court fixed a subsequent date for argument as to whether the decree did, in fact, violate the provisions of the Treaty. At the subsequent hearing the Court said :

"The importation of goods across the Belgo-Luxemburg frontier is not governed by the law relating to customs, Article 2 of the Treaty of Economic Union of July 25, 1921, providing that the territories of the two countries shall be regarded as one and the same territory for customs purposes, and that there is no longer any customs frontier between them. The decree of April 3, 1937, which is not concerned with the law relating to customs and which does not refer to the latter, was not enacted for fiscal purposes or for the purpose of protecting Luxemburg producers against competition from abroad, but for the purpose of preventing consumers from being deceived as to the quality or country of origin of goods.

"In the last resort it is contended that the decree of 1937 is unlawful as violating the provisions contained in Article 3 of the Treaty of Economic Union which postulates that there shall be full and complete freedom of trade between the two countries, without any obstacle or prohibition as to importation or exportation. The appellant is wrong in contending that the requirement to indicate on Belgian eggs the country of origin constitutes an obstacle to freedom of trade between the two countries, when in fact the right to export and import remains free in all other respects. The Belgian ministerial decree of March 18, 1948, which was substituted for the decree of May 30, 1934, relating to the exportation of eggs, provides that Belgian eggs intended for export must bear the imprint of Belgian origin, from which it follows that the corresponding provision of the decree of the Grand Duchy of April 3, 1937, does not violate the tenor or the spirit of the Treaty of Economic Union.

"The appellant has been rightly convicted of the offence of importation as charged, and the court has rightly ordered the confiscation of the eggs."

In the result, while dismissing the appeal on the grounds contained in the judgment, the Court quashed the conviction of the appellant on the ground that he was entitled to the benefits of an amnesty promulgated between the date of the original hearing and the date of the hearing of the present appeal.

[Report: *Pasicrisie luxembourgeoise,* vol. xv, p. 72.]

International Law—Relation to Municipal Law—Treaties—Whether Part of Municipal Law—Extradition—Extradition for Offences Extraditable under Municipal Law but not under Relevant Treaty—Whether Lawful—Composite States—Extinction of States—Effect on Treaties—The Law of India. **Case No. 4**

BABU RAM SAKSENA *v.* THE STATE.

India, Supreme Court.

(Shri Harilal Kania C.J., Saiyid Fazl Ali, Patanjali Sastri, Mehr Chand Manajan, Mukherjea and Das JJ.)

May 5, 1950.

THE FACTS.—This was an appeal from an order of the High Court of Allahabad dismissing an application for the release of the appellant who was arrested in pursuance of an extradition warrant issued by the Regional Commissioner of the United State of Rajasthan (India). Appellant, who at the time of his arrest was a member of the Uttar Pradesh Civil Service, was charged with extortion and cheating—offences extraditable under the Indian Extradition Act, 1903—while he held high administrative offices in the former State of Tonk. The warrant required the District Magistrate of Naintal to deliver the appellant to the District Magistrate of Tonk. It was contended on behalf of the appellant that the above offences were not included in the Treaty of 1869 between the British Government and the Tonk State, which Treaty, in the view of counsel for the appellant, exclusively governed all matters relating to extradition between the two States. Counsel also relied on Section 18 of the Extradition Act of 1903, which provides that nothing "shall derogate from the provisions of any treaty for the extradition of offenders". For the Government it was maintained that the Treaty of 1869 had lapsed as from August 16, 1947, when the State of Tonk acceded to the Dominion of India. It was alleged, in addition, that whatever sovereignty the State of Tonk might have possessed was extinguished when it covenanted with certain other States (the last of the agreements having been entered into on March 30, 1949) " to unite and integrate their territories in one State, with a common executive, legislature and judiciary, by the name of the United States of Rajasthan ". Lastly, it was claimed that even assuming that the Treaty of 1869 was still in force, its provisions were in no way contrary to the Extradition Act of 1903.

Held: that the appeal must be dismissed. Kania C.J. and Patanjali Sastri J. (with Fazl Ali J. concurring) held that, by providing for extradition for additional offences, the Extradition Act of 1903 did not derogate from the provisions of the Treaty of 1869 (assuming always that that Treaty subsisted after the merger of the Tonk State). Mukherjea J. (with Fazl Ali, Manajan and Das JJ. concurring) held that the Extradition Treaty could no longer be enforced in view of the merger of the Tonk State in the United States of Rajasthan, but that inasmuch as the conditions laid down in the Extradition Act had been complied with the warrant was not illegal.

I. Treaties of Extradition and Implementing Municipal Acts.—The Court said (*per* Patanjali J. delivering the Judgment of Kania C.J., and his own) : " It was not disputed before us that the present case would fall within section 7 of the Act, all the requirements thereof being satisfied, if only the applicability of the section was not excluded, under section 18, by reason of the Extradition Treaty of 1869, assuming that it still subsists. The question accordingly arises whether extradition under section 7 for an offence which is not extraditable under the treaty is, in any sense, a derogation from the provisions of the treaty, which provides for the extradition of offenders for certain specified offences therein called ' heinous offences ', committed in the respective territories of the high contracting parties. Under Article 1 the Government of the Tonk State undertakes to extradite any person, whether a British or a foreign subject, who commits a heinous offence in British territory. A reciprocal obligation is cast by Article 2 on the British Government to extradite a subject of Tonk committing such an offence within the limits of that State. Article 3 provides, *inter alia,* that any person other than a Tonk subject committing a heinous offence within the limits of the Tonk State and seeking asylum in British territory shall be apprehended and the case investigated by such Court as the British Government may direct. Article 4 prescribes the procedure to be adopted and the conditions to be fulfilled before extradition could be had, and Article 5 enumerates the offences which are ' to be deemed as coming within the category of heinous offences ', which, however, do not include the offences charged against the appellant.

"The argument on behalf of appellant was put thus: The maxim *expressio unius est exclusio alterius* is applicable, as pointed out by *McNair on The Law of Treaties* (1938—pp. 203, 204), to the interpretation of treaties. According to that rule the treaty in question should be read as allowing extradition only for the specified offences and for no others, that is to say, as implying a *prohibition* of extradition by either State for any other offence than those enumerated in Article 5. Further, while the treaty entitled each of the high contracting parties to demand extradition on a reciprocal basis, a unilateral undertaking by the Indian Government to grant extradition for an offence for which it could not claim extradition under the treaty violates the principle of reciprocity which is the recognised basis of all international compacts for extradition. Such an arrangement places the State of Tonk in a more advantageous position, which was not contemplated by the framers of the treaty. And where, as here, the person whose surrender is demanded is an Indian subject who is not liable to be extradited under the treaty, his surrender under section 7 trenches upon the liberty of the subject. In so far, therefore, as that section authorises extradition of a person, especially when he is an Indian subject, for an offence which is not extraditable under the treaty, it derogates from the provisions of the treaty within the meaning of section 18, and its application to the present case is thereby excluded. The argument proceeds on a misconception and cannot be accepted.

"No doubt the enumeration of 'heinous offences' in Article 5 of the treaty is exhaustive in the sense that the high contracting parties are not entitled, under the treaty, to claim extradition of criminals in respect of other offences. But we cannot agree that such enumeration implies a *prohibition* against either of those parties providing by its own municipal laws for the surrender of criminals for other offences not covered by the treaty. It is difficult to imagine why the contracting States should place such a fetter on their respective legislatures in advance not only in regard to their subjects but also in regard to alien offenders, for, if such prohibition is at all to be implied, it should cover both. As pointed out in *Wheaton's International Law*, there is no universally recognised practice that there can be no extradition except under a treaty, for some countries grant extradition without a treaty: (Fourth Edition, sections 116 (*a*) to (*d*), pp. 186–189). No doubt the constitutional doctrine in England is that the Crown makes treaties with foreign States for extradition of criminals, but those treaties can only be carried into effect by Act of Parliament: (*ibid.*—section 116 (*b*), p. 187). Accordingly, the Extradition Acts are made applicable by an Order in Council in the case of each State which enters into an extradition treaty with the Crown, and they are made applicable only so

Case No. 4 *Contd.*

far as they can be applied consistently with the terms and conditions contained in the treaty. Under such a system, where the high contracting parties expressly provide that their own subjects shall not be delivered up, as in the case of the treaty between England and Switzerland, the power to arrest and surrender does not exist: *Regina* v. *Wilson.*[1] This, it was observed by Cockburn C.J. in that case, was a 'serious blot' on the British system of extradition, and the Royal Commission on Extradition, of which he was the chairman, recommended in their report that 'reciprocity in this matter should no longer be insisted upon, whether the criminal be a British subject or not. If he has broken the laws of a foreign country his liability to be tried by them ought not to depend upon his nationality. . . . The convenience of trying crimes in the country where they were committed is obvious. It is very much easier to transport the criminal to the place of his offence than to carry all the witnesses and proofs to some other country where the trial is to be held' (*Wheaton*, section 120 (*a*), pp. 197, 198). Evidently, similar considerations led to the passing of the Act by the Indian Legislature providing for the surrender of criminals, including Indian subjects, for a wide variety of offences, with power to the Governor-General in Council to add to the list of notifications in the Gazette generally for all States or specially for any one or more States. This statutory authority to surrender cannot of course enlarge the obligation of the other party where an extradition treaty has been entered into, and this is made clear by section 18. But it is equally clear that the Act does not derogate from any such treaty when it authorises the Indian Government to grant extradition for some additional offences, thereby enlarging, not curtailing, the power of the other party to claim surrender of criminals. Nor does the Act derogate, in the true sense of the term, from the position of an Indian subject under the treaty of 1869. That treaty created no right in the subjects of either State any more than in fugitive aliens not to be extradited for other than 'heinous offences'. It is noteworthy that even in *Wilson's case* (*ubi supra*), where there was an exception in the treaty in favour of the subjects of the contracting States, the decision was based not on the ground that the treaty by itself conferred any right or privilege on English subjects not to be surrendered but on the ground that the Order in Council applying the Extradition Act, 1870, to Switzerland limited its operation, consistently with the terms of the treaty, to persons other than English subjects. It is, therefore, not correct to say that, by providing for extradition for additional offences, the Act derogates from the rights of Indian citizens under the treaty or from the provisions of the treaty. We are accordingly of opinion that the arrest and surrender of the appellant under section 7 of the Act is not rendered unlawful by anything contained in the treaty of 1869, assuming that it still subsists." ([1950] S.C.R., pp. 576–580.)

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[1] 3 Q.B.D. 42.

II. State Succession and Treaties. Merger of States.—Per Mukherjea J.: " The question now is how far was the Extradition Treaty between the Tonk State and the British Government affected by reason of the merger of the State into the United State of Rajasthan. When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the general opinion of International Jurists is that the treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of State life.[1] The cases discussed in this connection are generally cases where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of the former's treaties with other States. Thus the forcible incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the Treaties of the Independent Republic of Texas.[2] The position is the same when Korea merged into Japan. According to Oppenheim, whose opinion has been relied upon by Sir Alladi, no succession of rights and duties ordinarily takes place in such cases, and as political and personal treaties presuppose the existence of a contracting State, they are altogether extinguished. It is a debatable point whether succession takes place in cases of treaties relating to commerce or extradition, but here again the majority of writers are of opinion that they do not survive merger or annexation.[3]

" The remarks quoted above do not, however, seem quite appropriate to a case of the present description. Here there was no absorption of one State by another, which would put an end to the State life of the former and extinguish its personality. What happened here was that several States voluntarily united together and integrated their territories so as to form a larger and composite State of which every one of the covenanting parties was a component part. There was to be one common executive, legislature and judiciary and the Council of Rulers would consist of the Rulers of all the Covenanting States. It may not be said, therefore, that the Covenanting States lost their personality altogether and it is to be noted that for purposes of succession of Rulership and for counting votes on the strength of population and other purposes the Covenant of Merger recognises a quasi-separation between the

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[1] *Vide* Hyde, *International Law* (2nd ed., 1945), vol. iii, p. 1529.

[2] *Ibid.*, p. 1531.

[3] Oppenheim, *International Law*, vol. i, p. 152.

Case No. 4 *Contd.*

territories of the different States. But although such separation exists for some purposes between one State territory and another, it is clear that the inhabitants of all the different States became, from the date of merger, the subjects of the United State of Rajasthan and they could not be described as subjects of any particular State. There is no such thing as [a] subject of the Tonk State existing at the present day, and the Ruler of Tonk cannot independently and in his own right exercise any form of sovereignty or control over the Tonk territory. The Government, which exercises sovereign powers, is only one, even though the different Rulers may have a voice in it. It seems to us that in those altered circumstances the Extradition Treaty of 1869 has become entirely incapable of execution. It is not possible for the Tonk State, which is one of the contracting parties, to act in accordance with the terms of the treaty, for it has no longer any independent authority or sovereign rights over the Tonk territory and can neither make nor demand extradition. When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded, the treaty must necessarily lapse.[1] It cannot be said that the sovereignty of the Tonk State in this respect is now vested in the United State of Rajasthan. The authority, so far as extradition was concerned, was already surrendered by the Tonk State in favour of the Dominion Government by the Instrument of Accession. But even assuming that these treaty rights could devolve upon the United State of Rajasthan by reason of article 6 of the Covenant of Merger, the latter, it seems to me, would be totally incapable of giving effect to the terms of the treaty. As has been said already, there could be no such thing as a subject of the Tonk State at the present moment, and article 2 of the Treaty, which provides for extradition of Tonk subjects accused of having committed heinous offences within Tonk territory and seeking asylum elsewhere, would be wholly infructuous. The United State of Rajasthan could not possibly demand extradition on the basis of this article, and if reciprocity, which is the essence of an Extradition Agreement, is gone, the Treaty must be deemed to be void and inoperative.

"The decision in *Terlinden* v. *Ames*,[2] which was relied upon by Sir Alladi in the course of his arguments, rather fortifies the view that I have taken. The question there was whether an Extradition Treaty between Prussia and the United States of America, which was entered into in 1852, could be given effect to after the incorporation of Prussia into the German Empire. The question was answered in the affirmative. It was pointed out, *inter alia*, that the Constitution of the German

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[1] Hyde, *International Law* (2nd ed., 1945), vol. iii, p. 1535.

[2] 184 U.S. 270.

Empire left sufficient independent power and sovereignty to the States composing the confederation to enable them to act upon these treaties and it was observed by Chief Justice Fuller, who delivered the opinion of the Court, that where sovereignty in respect to the execution of treaties is not extinguished and the power to execute remains unimpaired, outstanding treaties cannot be regarded as void. This is the real criterion and as obviously the power of the Tonk State to execute the treaty is altogether gone after the Covenant of Merger, the treaty cannot but be regarded as void. . . .

" My conclusion, therefore, is that the Extradition Treaty between the Tonk State and the British Government in 1869 is not capable of being given effect to in the present day in view of the merger of the Tonk State in the United State of Rajasthan. As no treaty rights exist, section 18 of the Indian Extradition Act has no application, and section 7 of the Act has been complied with, there is no ground upon which we can interfere."

[Report : [1950] *S.C.R.*, pp. 573 ff.]

International Law—Relation to Municipal Law—Treaties—Whether Part of Municipal Law—Absence of Enabling Legislation—Enforcement of Treaties in Municipal Courts—The Law of India. **Case No. 5**

BIRMA *v.* STATE.

India, High Court of Rajasthan (*Divisional Bench*).
(Ranawat and Mehta JJ.) *March* 17, 1950.

THE FACTS.—This was a petition of habeas corpus on behalf of Birma Nai, who was arrested in Dholpur on instructions of the Legal Remembrancer of the Government of the United States of Matsya in order to be surrendered as a fugitive criminal to the Government of the United Provinces. Counsel for the petitioner argued that there was no extradition law in force in the area of the former Dholpur State and that the Treaty of 1869 between the British Government and the Dholpur State regarding extradition of criminals could not be deemed to be law within the meaning of Section 21[1] of the Constitution of India as that Treaty had not been incorporated in any municipal law of the Dholpur State.

Held : that the petition must be granted. The Extradition Treaty between the former Dholpur State and the British Government, not having been incorporated into the law of that State by legislative enactment, had not become part of the municipal law of the Dholpur State and was not, therefore, a law in the area of the former Dholpur State under Article 372 of the Constitution of India.[1]

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[1] See below, p. 19.

The Court referred to *Halsbury's Laws of England* (vol. 6, Part V, §§ 678 and 679), to *The Parlement Belge* (1879) 4 P.D. 129, and to *Walker* v. *Baird* (1892 A.C. 491 ; L.J.C. 92) in support of a contention that in England under common law a treaty requires the sanction of Parliament to make it enforceable by the officers of the Crown and binding upon the State in cases where it affects the private rights of a subject. The Court relied also upon *Mangilal* v. *Sarker* (Court of Final Appeal, Udaipur) regarding the validity of an extradition treaty between the States of Udaipur and Gwalior. The following extracts from the judgment in that case were quoted, *inter alia* :

" Pursuant to the treaty, however, no extradition law appears to have been passed by Shriji though executive orders to district officers appear to have been passed on 3.2.1915. It is unfortunate that in a matter like extradition there should have been no law expressly brought into force in Mewar. The law of extradition was stated by Lord Russel C.J. in *Re Arton* (1896) 1 Q.B. (No. 1), 108 (65 L.J.M.C. 23), at pp. 111–112.

" ' The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice. But the application of this principle in certain matters, such as the conditions upon which, and the class of crimes in respect of which, extradition is to be granted and the formalities to be observed upon an application for extradition are primarily matters for two political powers concerned to arrange in the first instance by treaty ; having arranged them by treaty, the next step is by legislative enactments to give them the form of law and to express in an Act of Parliament the conditions and the limitations imposed upon the grant of extradition and the class of crimes to which extradition is to apply. It is to the expression of the legislature in Acts of Parliament and to that alone that judicial tribunals can refer.'

" Mere execution of a treaty for extradition cannot by itself be treated as equivalent to enacting law carrying it into effect. Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature. Oppenheim, *International Law*, Vol. I, p. 38. The same is the position under the Government of India Act, 1935. Implementing treaties and extradition, Sch. VII, list I, item 3, are both matters for which there must be legislation before action can be taken.

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[1] That Article provides for the continuation of the law in force in the territory of India until altered, repealed or amended by competent authorities.

"The Mewar Government appears to have proceeded throughout on the basis that mere signing of the treaty and issue of executive orders to district officials was sufficient to make its stipulations binding upon its subjects, the Courts and officials. But the official publication of a treaty by the Government under international law will be sufficient only if the municipal law of that State justified it. It appears that the Mewar Government have been acting for many years on the footing that the treaty and the orders of Shriji operate as municipal law. Even the treaty with the British Government made on 16.12.1868 and found in Aitcheson's *Treaties*, Vol. III, p. 36, does not appear to have been brought into operation by legislative enactment. Under Art. XXIV, Cl. 4 (1), of the Constitution all laws in force on the date of its promulgation have been continued as such after its promulgation, but in our opinion a practice of the kind aforesaid cannot be deemed to be a law which is continued by the Constitution."

The Court went on to say:

"It may be noted that the treaty between the British Government and the Dholpur State after it was signed was not given the form of law by means of a legislative enactment. But it was being acted upon by the Dholpur State authorities up to the time the State was merged into the United States of Matsya, as if it was good law. Perhaps nobody may have questioned its legality. All laws that were in force in the then Dholpur State and subsequently in the United States of Matsya continued to be the laws in force in the area of the former Dholpur State, firstly under the provisions of the Ordinance Bo. 1 of the United States of Rajasthan and subsequently by virtue of S. 372, Const. Ind. Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislative authority. In the present case the treaty remained a treaty only and no action was taken to incorporate it into a law. That treaty cannot, therefore, be regarded as a part of the municipal law of the then Dholpur State, and the practice of surrendering fugitive criminals which was being followed by the former Dholpur State cannot be deemed to be a law that could be continued under S. 372, Const. Ind. S. 21, Const. Ind. lays down: 'that no person shall be deprived of his life or personal liberty except according to procedure established by law'.

"When the extradition treaty of the Dholpur State is, as discussed above, held not to possess the force of law, the liberty of a citizen of India cannot be taken away under it. The detention of the petitioner under the provisions of this treaty cannot, therefore, be held valid, because it cannot be said to be according to procedure established by law.

Case No. 5 *Contd.*

" In conclusion it may be observed that the detention of the petitioner being not in accordance with the procedure established by law, an order under S. 491 to set him free should be made. This petition is accepted and it is ordered that Birma Nai be set at liberty forthwith."

[Reports: *A.I.R.*, 1951 (October), Rajasthan 127; *A.I.R.*, 1951 (November), Rajasthan 129.]

NOTE.—The above case was relied upon in *Nanka* v. *Govt. of Rajasthan* (Jaipur Bench, August 9, 1950) where the Court allowed an application for habeas corpus regarding the extradition of petitioner from Dholpur (Rajasthan) to Uttar Pradesh. The treaty referred to above between Great Britain and the State of Dholpur was invoked on behalf of the Government. The Court said:

". . . It has been conceded by the Government Advocate that there was no statutory law in force on the subject of extradition in the former Dholpur State. It is, therefore, clear that the treaty of 1869 remained a mere treaty so far as Dholpur State was concerned. It is true that offenders were extradited to British India and some Indian States in accordance with the Treaty of 1869. But this practice cannot give a mere treaty the force of law.

" It is true that in the then state of affairs His Highness the Maharaja Rana was the highest executive as well as the legislative authority. This, however, does not mean that any executive act of the Maharaja Rana amounted to a legislative act. Entering into a treaty with British India was an executive act, and the treaty to have a binding effect upon a subject had to be incorporated into a municipal law." [Report: *A.I.R.*, 1951 (December), Rajasthan 153.]

Case No. 6

International Law—Relation to Municipal Law—Treaties as Part of the Law of the Land—The Law of Mexico.

Re CONDE.

Mexico, Supreme Court. June 26, 1950.

THE FACTS.—The complainant, Manuel E. Conde, sought federal protection (*amparo*) against the Secretary of Foreign Relations for a violation of constitutional guarantees arising out of the seizure of an automobile belonging to the complainant under the provisions of the Convention with the United States for the recovery and restoration of stolen vehicles.[1]

Held: that *amparo* must be denied. The stipulations of treaties concluded with foreign Powers have the force of law for all inhabitants of the country; there is no violation of individual guarantees arising out of the enforcement of the provisions of a treaty where there is a possibility of recourse to the courts. The Court said:

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[1] 180 *League of Nations Treaty Series* (1937–38), p. 33.

1. "Briefly, the complaint is that Articles 193 and 194 together with Articles 73 and 74 of the Law of Amparo have been violated. The first provides that judgments of the Supreme Court constitute jurisprudence following five consecutive decisions which, not having been interrupted by any to the contrary, have received the approval of at least four judges. The second provides that jurisprudence concerning *amparo* proceedings or proceedings which involve the application of federal laws or of treaties with foreign States creates a rule for the Circuit Courts, District Courts, Courts of the States, Federal District, and Federal Territories, and for Conciliation and Arbitration Councils. The Supreme Court has established as a matter of jurisprudence[1] that an action may not be regarded as irrevocably terminated where there is a possibility of relief by the courts and the consequent restoration of the situation to the condition obtaining prior to the violation which gave rise to the complaint, that is to say, that an action is irrevocably terminated where it is physically impossible to restore the matter to the condition obtaining prior to the violation. The latter situation does not exist in the present case; even though the responsible authority may have sought to protect foreign interests at the risk of sacrificing the interests and patrimony of Mexicans without regard to fundamental principles of our Constitution, there is the possibility by resort to diplomatic measures of assuring the material return of the property in question, *i.e.* the recovery of the vehicle for the complainant or, alternatively, of requiring an indemnification for the injury done to the complainant.

2. "It cannot be maintained, then, that the issue under examination has been irrevocably determined. The matter is not one which it is physically impossible to restore to the condition existing prior to the violation, since there is a possibility of obtaining by diplomatic means the return of the vehicle or damages therefor. Consequently, the complaint is not well founded, as the issue may be reopened for examination on the merits under the terms of Article 92 of the Law regulating Articles 103 and 107 of the Constitution. The action taken by the responsible authority was based on provisions of the Convention between Mexico and the United States of America for the recovery and restoration of motor vehicles which have been stolen or which have been the object of a crime against property. This Convention is an international treaty which under Article 133 of the Constitution has the status of supreme law of the Union. Given the character of the treaty as fundamental law and the strict application of the same in the present

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[1] Thesis 29, 76 *Semanario Judicial de la Federación* (5a Época), Appendix, p. 80.

Case No. 6 Contd. case, the action of the responsible authority is legal and does not violate any guarantees. As to this point, the Supreme Court has held that 'stipulations of treaties concluded with foreign Powers have the force of law for all inhabitants of the country'."[1]

[Report: 104 *Semanario Judicial de la Federación* (5a Época), pt. 3, p. 2243.]

International Law—Relationship to Municipal Law—Treaty between United Kingdom and Italy—Whether Part of English Municipal Law—Absence of Explicit Incorporation as Part of the Law of the Land.

See Case No. 1 (*Republic of Italy* v. *Hambros Bank, Ltd.*).

International Law—Relation to Municipal Law—The Law of Italy—Hague Conventions as Part of Italian Law.

See Case No. 138 (*Colorni* v. *Ministry of War*).

International Law—Relation to Municipal Law—Overriding Effect of Treaties.

See Case No. 125 (*In re Rohrig, Brunner and Heinze*).

International Law and Municipal Law—Primacy of Municipal Law—The Law of Switzerland.

See Case No. 94 (*Thurgau* v. *Lang and Legler*).

International Law and Municipal Law—Order of Precedence—Subsequent Statute in Conflict with Existing Treaty—Treaty Providing for Freedom of Trade.

See Case No. 3 (*Huberty* v. *Public Prosecutor*).

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[1] 22 *Semanario Judicial de la Federación* (5a Época), p. 576.

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

I.—Beginning of State Existence

[For Recognition see below, D.]

States—Beginning of Existence of—Factual Existence—Absence of Recognition—South Moluccas Republic.

See Case No. 39 (*Republic of the South Moluccas* v. *Royal Packet Shipping Co.*).

II.—Sovereignty and Independence

i.—In Foreign Relations

[See also below, *Recognition of Acts of Foreign States and Governments*; Part IV, JURISDICTION; and Part VIII, TREATIES: *Interpretation of Treaties —Restrictive Interpretation.*]

States—Independence—Conduct of Foreign Relations—Exercise of Prerogative of the Crown—Whether Questionable in Courts—Passports—Issue of a Passport as a Contract—Cancellation of a Passport by the Executive—Implications of the Grant and Revocation of Passports in Relations with Foreign States—The Law of South Africa. **Case No. 7**

SACHS *v.* DONGES, N.O.

South Africa, Appellate Division.
(Watermeyer C.J., Centlivres, Greenberg, Schreiner
and van den Heever JJ.A.).
March 14, 1950.

THE FACTS.—This was an appeal against an order of the Witwatersrand Local Division directing Mr. Sachs, General Secretary of the Garment Workers' Union, to hand over his passport to the immigration authorities for cancellation. Mr. Sachs alleged in the Court below that the revocation of his passport by the Minister of the Interior was prompted by considerations of personal dislike and party politics. The lower Court accepted the contention put forward in the Minister's reply to the effect that the " granting or refusal of a passport

Case No. 7 *Contd.*

to a Union national is in the nature of the exercise of an act of the prerogative of the Crown and in the discretion of the Minister of the Interior representing the Crown, and that consequently it is a privilege which can be withdrawn at any time by the Crown or the Government of the Union of South Africa without assigning any reasons for such withdrawal".

It was argued on behalf of the appellant that the issue of a passport is an exercise of the power of the Prerogative to make grants and confer rights as distinguished from the power to conduct foreign affairs and that a prerogative grant could only be revoked by due process of law. Counsel for the respondent relied *inter alia* on the definition of passport evolved by the United States (Hackworth, *Digest of International Law*, vol. 3, at p. 435; Hyde, *International Law*, vol. ii, para. 399, at p. 1188) in asserting that the granting or issuing of passports is an exercise of the Royal Prerogative in the field of foreign relations and that it constitutes merely a licence or privilege, the withdrawal of which is also within the powers of the Prerogative and not subject to judicial review.

Held (*per* Watermeyer C.J.°, Centlivres and van den Heever JJ.A. dissenting): that the appeal must be allowed. The Executive has no right to revoke a passport at its discretion. The Court said:

". . . From a juristic point of view the grant of a passport is a contract. In consideration of a fee of £1 a document of value to the recipient is delivered to him upon certain conditions. The conditions are an intimation to the recipient that the passport is valid for five years and can be renewed on payment of a fee, but that it may be cancelled for stated causes. In the present case not only was the document accepted and paid for on these conditions, but the representations contained in it were acted upon by the recipient who incurred expense in consequence of them. So that a right to possession and retention of the passport vested in the recipient by delivery of it subject to those conditions, and the principles of estoppel, prevent the Crown from claiming any right inconsistent with them. . . ."

The Court dealt at some length with the powers of the Prerogative in Great Britain and in the Union of South Africa. It summed up as follows: "when a grant of rights to a subject has been made by the Crown, the subject cannot be deprived of those rights by an executive revocation of the grant; the grant may, however, be set aside by the Court upon good legal grounds. . . ."

Discussing the maxim "the King can do no wrong", the Court said: ". . . the maxim does not mean that acts done by virtue of the Royal Prerogative are necessarily legal and valid. While the King, in a personal sense, is incapable of doing wrong, yet the acts done by his authorised servants may be contrary to law, and on that account may be set aside by the Courts."

The Court denied also the contention that the revocation of a passport is an Act of State which cannot be questioned in a court of law.

Appeal allowed with costs.

The dissenting opinions of Centlivres and van den Heever JJ.A. included, *inter alia*, an analysis of the function of passports in the relations between States. Centlivres J.A. said:

". . . To-day it is an anomaly that a passport should be issued by the Department of the Interior. Probably when Union passports were first issued there was no Department of External Affairs. To-day there is such a department and Union officials stationed abroad who are required by a Union passport to render the bearer every assistance and protection are officials of the Department of External Affairs. Moreover, should any difficulty arise in connection with the sojourn in a foreign country of a South African citizen, the proper department to conduct negotiations on behalf of the Union would be the Department of External Affairs. In these circumstances one would expect Union passports to be issued under the facsimile signature of the Minister of External Affairs. . . ."

". . . In the case of passports the case against holding that a contract was intended to be entered into is, I think, much stronger. A passport is issued as an administrative act in order to facilitate the travelling abroad of the bearer: the State does not thereby undertake any obligations toward the bearer. I do not think that the wording of a passport imposes upon the State which issues it an obligation through its officers stationed abroad to afford assistance and protection in every conceivable circumstance that may arise. As the text writers show, a State is entitled but not bound to afford protection to its citizens in a foreign country. [The learned Judge quoted from Oppenheim's *International Law*, 7th ed., p. 626, in support of this contention.] . . . Every sovereign State is concerned with the conduct of foreign affairs and it seems to be clear on the authorities that, in the absence of legislation on the subject, the conduct of foreign affairs rests in the hands of the Crown. (Cf. *Halsbury* (2nd ed., vol. 6, para. 622).) It is for this reason that the granting or refusal of a passport is part of the Royal Prerogative and that no action lies to compel the Crown to issue a passport. It is for the Crown to decide whether at any particular time one of its subjects should be in possession of a passport to facilitate his travelling to any foreign country and, if this view is sound, it follows that the Crown has the right to cancel a passport. Were it otherwise, the anomalous position would arise that the Crown in its conduct of foreign affairs would be free to refuse to grant passports but would

Case No. 7 *Contd.*

have no power to cancel passports already issued. To hold that the Crown cannot cancel a passport would seriously and unjustifiably hamper the Crown in its conduct of foreign affairs. . . . The judiciary cannot usurp the functions of the executive and, having regard to foreign relations, it is essentially a function of the executive to decide whether a passport should or should not be cancelled. . . . There is nothing to suggest that the request and the requirement (set forth in the passport) to render assistance and protection cannot be withdrawn at any time by letters addressed to the foreign countries concerned and Union officials stationed in those countries, but the most effective manner of doing this is to call in the passport for the purpose of cancellation. The proper person to call in and cancel a passport is the Minister of the Interior under whose authority a passport must be taken to have been issued. . . . Indeed, if the Minister did not have that right, an anomaly may well arise as between citizen and citizen. For reasons connected with an international situation which has suddenly arisen the Minister may decide not to issue any passport to a particular country : if he did not have the power to cancel a passport for travel to that country, A, who had previously obtained a passport before the international situation had arisen, would be in a better position than B who had obtained no such passport. . . ."

Van den Heever J.A. (dissenting) said : ". . . I turn now to the passport in question. In *Rex* v. *Brailsford* ((1905), 2 K.B. at p. 745) *Lord Alverstone* says :

" ' It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.'

" In *Joyce* v. *Director of Public Prosecutions* ((1946) 1 A.E.R. 186 at p. 190) Lord Jowitt L.C. quoted this *dictum* with approval and stated that where a passport was issued to a British subject ' it serves as a voucher and means of identification '.

" It was argued before us that this cannot apply to a South African passport which is issued without inquiry into the applicant's character and antecedents. How that circumstance can affect the nature of the document I do not understand. The measures taken by the Department are a matter for it to decide. *Non constat* that no measures are taken at all. For all I know each issuing authority may be furnished with a list of individuals to whom passports should not be issued at all or no passport to travel in a particular country.

In any event the adequacy of precautionary measures taken may become an issue between the Government and the foreign country which receives the bearer on the strength of the passport but can hardly affect the relations between the bearer and the issuing Executive. . . ."

". . . A South African national who gains admission to a foreign country may there be a subversive factor who embarrasses not only the host-state but causes strained relations between that state and his own. It is necessary to remind ourselves only of the background to the case *Rex* v. *Brailsford* and the *Sarajevo* incident as illustrations of this fact. The modern tendency is towards nationalistic exclusiveness in regard to competition in the labour market and in enterprise. For these reasons the passport with which we are concerned contains two separate documents: the one is a certificate of the bearer's national status and the other is a letter *rogatoire* requiring the authorities of foreign states in the name of the King 'to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need'.

"If the bearer should become destitute in such foreign country and a public charge, or if he becomes a menace to its peace and safety and the host-state should wish to repatriate him, I think any international tribunal will hold that the Union is estopped from disavowing the person it has held out to be a national even if in fact he is not. Similarly I consider that such a state would be entitled to consider it an unfriendly act on the part of the Union authorities if, being forewarned, they furnished a person who is potentially dangerous or embarrassing to the receiving state with such a voucher and letter of request or knowingly suffer him to retain them. . . ."

[Report: (1950), 2 S.A.L.R. 265.]

NOTE.—For the application of this judgment see *Donges, N.O.* v. *Dadoo* ((1950), 2 S.A.L.R. 321).

States—Independence—Intervention—Prohibition of—Asylum in Legations and Prohibition of Intervention.

See Case No. 90 (*Asylum Case* (*Colombia/Peru*)).

Conclusiveness of Statements by the Executive—Succession to Treaty Rights—The Law of Singapore.

See Case No. 21 (*Re Westerling*).

IV.—Recognition of Acts of Foreign States and Governments

[See also Part IV, JURISDICTION : I, *Territorial* ; and below, D, *Recognition of States, Governments and Belligerency.*]

Case No. 8 **Recognition of Acts of Foreign States—Confiscatory Legislation—Extra-Territorial Effect of—Expropriation of Foreign Business Enterprise by Foreign State—Situs of Trade Marks—Right of Expropriated Owners of Enterprise to Institute Proceedings for Infringement of Trade Mark—Whether Joinder of Expropriating Government Required—Law of Procedure in New York State.**

ZWACK *ET AL. v.* KRAUS BROS. & CO., INC.

United States, District Court for the Southern District of New York. November 2, 1950.

THE FACTS.—In an action by the partners of a partnership constituted under Hungarian law for infringement of certain trade marks registered in the United States, of which the plaintiffs were the registered owners, the defendants, a company registered in the United States, contended that as the plaintiffs' business in Hungary had been taken over by the Hungarian Government which continued to manufacture in Hungary and sell in the United States goods to which the trade marks were affixed, the Hungarian Government was an indispensable party to the proceedings, and that in its absence the Court had no jurisdiction to determine the question of infringement. The plaintiffs contended that the taking over of their business in Hungary was tantamount to confiscation and therefore of no effect in the United States where the trade marks, the subject of the action, were situate, and that as they continued to be the owners of the trade mark they alone were entitled to institute proceedings for infringement.

Held: that the plaintiffs' contention was correct, that accordingly the Hungarian Government was not an indispensable party to the proceedings, and that the action must be allowed to proceed on the merits. The Court said :

" Defendant has moved to dismiss the complaint pursuant to the provisions of Rules 12 (b) (7) and 19, Federal Rules of Civil Procedure, 28 U.S.C.A. (,) [*sic*] on the ground that indispensable parties have not been joined.

" This action is brought by John and Béla Zwack on behalf of J. Zwack & Co., a Hungarian partnership which manufactures and distributes alcoholic beverages under the trademarks ' Zwack ', ' J. Zwack & Co.', ' J. Zwack ', and ' Zwack, J.' All of these marks are registered in the United States Patent Office.

" Defendant is a New York corporation which, in 1933, entered into an agreement with the partnership whereby defendant became the exclusive distributor of the partnership's products in the United States. Allegedly pursuant to other agreements, defendant secured registrations of the trade-marks in its own name but for the benefit of the partnership and subject to its directions and withheld part of the moneys due to the partnership on sales made since 1939, crediting those moneys to the partnership's account. Defendant's contract of exclusive distribution is not due to expire until 1960.

" Plaintiffs allege that in 1948 the Government of Hungary seized the partnership's factory and confiscated it without compensation, and continued to operate it under its old name and to manufacture products to which the old trade-marks were affixed. Béla Zwack apparently remained with this governmentally-owned enterprise in some capacity, but there is no competent proof before me that he did so or as to his present status or whereabouts. John Zwack left Hungary on November 18, 1948, because, he states, he had been informed that he was in danger of being ' liquidated '. Immediately after his departure he notified the defendant of what had occurred and requested the defendant to terminate its dealings with the individuals who were then operating the partnership business. This, it is alleged, defendant declined to do, and, it is claimed, defendant has continued to import and distribute the output of the factory.

" Plaintiffs now sue on the partnership's behalf for trade-mark infringement, for an accounting, for specific performance of the agreement concerning the American trade-mark registrations, and to recover the sum of approximately $25,000 which, according to the allegations of the complaint, constitutes the deferred payments for goods sold by defendant since 1939.

" Defendant's motion to dismiss is based on the contention that Béla Zwack, admitted by the plaintiffs to be a copartner, his wife Dora, claimed by the defendant to be also a copartner, the Hungarian Government, and the ' presently existing firm of J. Zwack and Company of Budapest, Hungary ', are indispensable parties. Since these parties are not subject to the jurisdiction of the Court, unless they should voluntarily appear, which on the record before me seems unlikely, it is apparent that to grant defendant's motion would be to deny the plaintiffs any remedy and this result a court will properly ' strain ' to avoid. See *Bourdieu* v. *Pacific Western Oil Co.*, 1936, 299 U.S. 65, 70, 57 S. Ct. 51, 81 L.Ed. 42.

" Two practical factors seem to me to be at the root of the indispensable party rule. First is the desirability of avoiding a determination which will affect the interests of persons who are not before the court. See *Green* v. *Brophy*, 1940, 71 App. D.C. 299, 110 F. 2d 539, 541. Second is the desirability of protecting a defendant from a second liability on the same obligation should some court subsequently decide issues of fact in favor of the absent third party. *Russian Reinsurance Co.* v. *Stoddard*, 1925, 240 N.Y. 149, 147 N.E. 703. However, the rule is one fashioned in equity and the courts have taken care lest its application should result in inequity. *Parker Rust-Proof Co.* v. *Western Union Telegraph Co.*, 2 Cir., 1939, 105 F. 2d 976, *certiorari* denied 1939, 308 U.S. 597, 60 S. Ct. 128, 84 L.Ed. 500.

" In so far as the first practical consideration is involved, much will turn on the substantiality of the asserted interests which, it is claimed, will be affected by the determination of the issues raised by the complaint. When the existence of interests in third persons is conceded, the problem is merely one of appraising the effect an adjudication in the pending action will have on those interests. Most of the indispensable party cases deal with such a situation. See cases cited in *Baldwin* v. *Chase National Bank of New York, D.C.S.D.N.Y.* 1936, 16 F.Supp. 918, 920. Where the very existence of such interests is disputed, however, the problem differs. While it would be improper to determine on such a motion as this that third persons who are not before the court have no legal rights in the property in suit, *Green* v. *Brophy, supra,* nevertheless some appraisal of the substantiality of those asserted interests must be made, otherwise a court could not act whenever a claim was made by a defendant that an absent third party was vested with an interest adverse to that of the plaintiff, which would be affected by the litigation then in progress.

" The problem is not very difficult as to Béla and Dora Zwack. Under the Hungarian Law, John Zwack is empowered to bring this action on the partnership's behalf to enforce its contractual rights, and the defendant cannot challenge that right, ss. 81, 90, 91 and 93, Law XXXVII, Laws of 1875 of Hungary. They are, therefore, not indispensable parties.

" Whether the asserted interests of the Hungarian Government and what is termed the ' presently existing firm of J. Zwack & Company of Budapest, Hungary ' are claimed to arise from a contractual transfer, or from confiscation, on the basis of both the law and the facts now presented for my consideration I deem these asserted interests too insubstantial to warrant a dismissal of the action. The claimed contractual transfer is predicated upon an alleged offer by all the copartners made on November 9, 1948 ; but the evidence submitted by the defendant, to support its claim that the Hungarian Government has an interest which will be affected, itself demonstrates that the offer was not accepted until after it was withdrawn. The acceptance occurred on November 24, 1948 ; John Zwack had already fled from the country on that date, and his flight withdrew the offer, since it could not be accepted, by its terms, except by the tender of a passport to him. Moreover, even if the offer was still open on the 24th of November, there was a failure of consideration in that this substantial part of the return performance, indeed the only substantial consideration John Zwack was to receive, was not rendered. Finally, if by some chance the offer remained open and was accepted, the gross disproportion between the value of the partnership assets and the value of the consideration which the Hungarian Government was to furnish in itself raises serious doubts as to whether the offer was a voluntary one, or was, rather, coerced and therefore of no effect.

" If the claimed contractual interests are insubstantial, the interests possibly derived from confiscation, the only other alternative suggested by the parties, are even more so. Our courts do not recognize the confiscatory acts of foreign governments when those acts purport to affect property which was not within the territorial jurisdiction of that government, unless a national policy of the United States Government requires that such extra-territorial effect should be given. *United States* v. *Pink*, 1942, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796. The property here in suit was at all times within the United States and no national policy requires this Court to recognize the validity of its confiscation by the Hungarian Government.

" Not only are all these asserted interests thus insubstantial, but the danger of the defendant being held to a double liability is equally remote, due to the nature of the relief sought. In *Baglin* v. *Cusenier Co.*, 1911, 221 U.S. 580, 31 S.Ct. 669, 55 L.Ed. 863, similar claims were adjudicated without any question such as is before me now. To the extent that there is danger of double liability, the defendant may adequately protect itself by proceeding pursuant to s. 51-a of the New York Civil Practice Act, if indeed it is not already protected by a release.

" On these facts, it would be most inequitable and a complete, and for all practical purposes a final denial of the claim asserted by plaintiffs to dismiss the action on this motion. Of course, no determination now made is intended to preclude a trial of such issues as may be presented by the pleadings, and there is no denying the possibility, although it now seems little more than that, that a trial may result in a finding that the Hungarian Government or others may be vested with the ownership of the property which plaintiffs here claim. Be that as it may, it would be most inequitable and serve no justifiable practical purpose to dismiss the action now because of that vague possibility."

" Motion denied.

[Report : 93 F. Supp. 963.]

Case No. 9 **Recognition of Foreign Legislative Acts—Foreign Revenue Laws—Recognition of—Foreign Seamen Serving on Vessel Flying Foreign Flag—Payment of Wages in Port of United States—Whether Foreign Tax to be Deducted from Wages.**

KORTHINOS *ET AL.* v. NIARCHOS *ET AL.*

United States, Court of Appeals of the Fourth Circuit.
October 30, 1950.

THE FACTS.—The appellants were Greek seamen serving on a vessel flying the Greek flag, and they contended, *inter alia*—this being the only contention of interest in the present context—that the owners were not entitled, when paying their wages in the United States, to deduct therefrom the tax required to be deducted under Greek revenue law.

Held: that there was no principle of law which required a United States court to ignore foreign revenue laws in the circumstances here set out, and that the appellants' contention failed. The Court said:[1]

"Complaint is made, too, because deduction was allowed on account of taxes required to be deducted by the Greek government from the wages of seamen; but we know of no principle of law which would justify our ignoring such a requirement of the law of a foreign government with respect to the rights of its nationals serving as seamen on a vessel flying its flag and subject to its jurisdiction. The judge below relied upon the wage accounts and portage bills as evidence of the amount of the tax; and there is nothing to justify us in setting aside his finding with regard thereto.

"For the reasons stated, the decree appealed from . . . will be affirmed."

[Report: 184 F. 2d 716.]

Case No. 10 **Recognition of Acts of Foreign Governments—Nationalization Decrees—Extra-Territorial Effect of—Nationalization of Companies in Latvia—Legal Effects of.**

LATVIAN SHIPPING COMPANY v. MONTAN EXPORT LTD. AND OTHERS.

Holland, District Court of The Hague.
March 27 *and September* 25, 1946.

Court of Appeal of The Hague. January 20, 1950.

THE FACTS.—The Latvian Shipping Company, a Latvian limited company established at Riga, sued a Dutch company,

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[1] The judgment of the Court is set out only in so far as concerns this particular point.

Montan Export Ltd., and Messrs. de Monchy for payment of money due under a charter party. In their defence the defendants alleged that the plaintiff company had ceased to exist as a consequence of the nationalization of private undertakings effected in Latvia after her incorporation into the Union of Soviet Socialist Republics. The lower Court gave the defendants leave to adduce evidence to prove that the plaintiff company had ceased to exist as a legal entity after its nationalization and that its rights had not passed to a successor. The defendants having failed to produce such evidence, the Court gave judgment in favour of the plaintiffs. The defendants appealed.

Held (by the Court of Appeal): that the appeal must fail. Since the defendants had neither produced such evidence nor made any offer to produce evidence to the Court of Appeal, there were no grounds for upsetting the judgment of the Court below. The Latvian Company had argued that the nationalization measures taken in Latvia with regard to itself had had no further object than the appointment by the Government of new officials vested with exactly the same legal and statutory rights and duties as their predecessors. So long as no evidence contradicting this version was produced, there was no valid reason to deny the *persona standi* of the Company, the less so because it had given a wholly acceptable explanation of the legal structure under which it now operated *vis-à-vis* the outer world.

[Report: *N.J.*, 1950, No. 752.]

NOTE.—Although somewhat inconclusive, the above case has been reported as pointing indirectly to the recognition, in some aspects, of the extra-territorial effect of foreign nationalization decrees.

Recognition of Acts of Foreign Governments—Effects of Non-Recognition—Non-Recognition by the United States of America of the Government of the People's Republic of China.

See Case No. 17 (*Bank of China* v. *Wells Fargo Bank & Union Trust Company*).

V.—Continuity of States

[See also below, E, *State Succession*.]

Case No. 11 **States—Continuity of—Legal Position of Austria after Recovery of Independence from Germany—Whether Austria Liable for Damages for Non-Performance of Contract Made in Austria while Austria Incorporated in Germany—State Succession—Contract of Sale between Predecessor State and Private Purchaser—Purchaser's Claim for Damages for Non-Performance—Liability of Successor State.**

SCHÄCKE AND ANOTHER *v.* REPUBLIC OF AUSTRIA.

Austria, Supreme Restitution Commission.
September 23, 1950.

THE FACTS.—Shortly after the incorporation of Austria into Germany the German Secret State Police confiscated a factory owned by Austrian citizens and situate at Linz, in Austria. In 1939 the factory was sold by the Ministry of Finance in Vienna to the applicants who, after the liberation of Austria in 1945, had to return it to the original owners in pursuance of the relevant Austrian legislation concerning the restitution of property of which the true owners had been unlawfully deprived by virtue of discriminatory National-Socialist legislation. The applicants thereupon instituted the present proceedings against the Republic of Austria for damages for non-performance of the contract made between them and the Ministry of Finance in 1939. It was contended on their behalf that the Republic of Austria was the successor of the " Land " of Austria on whose behalf the Ministry of Finance had made the abortive contract, and that the Republic of Austria was accordingly liable for damages for non-performance. On behalf of the Republic of Austria it was contended that at the time when the contract was made Austria formed part of the German Reich and was not an independent State, and that the reconstituted Republic of Austria could not therefore be regarded as the successor of what had formerly been a constituent part of the German Reich and that accordingly the Republic of Austria was not liable to the applicants in damages. The applicants' claim having been dismissed by the Restitution Commission and the Higher Restitution Commission, the applicants now appealed to the Supreme Restitution Commission.

Held: that the Republic of Austria was not the successor of the " Land " of Austria which formed part of the German Reich when the contract was made, and that the applicants' appeal must be dismissed. The Court said :

"In view of the fact that the rights and duties of the 'Land' of Austria were transferred either to the German Reich or to constituent parts thereof (the so-called 'Reichsgaue'), the Republic of Austria, after regaining its independent status, cannot possibly be the successor in title of the 'Land' of Austria. Notwithstanding that the 'Ostmark' Law and the regulations implementing the same lost their operative force after the collapse of Germany, the provisions contained therein are relevant with respect to the period when they were operative. . . . Having regard to the fact that the German Reich became the successor in title of the 'Land' of Austria, the Republic of Austria cannot be held liable in civil law for acts carried out by the 'Land' of Austria. We must resolutely refuse to acknowledge any identity of the Republic of Austria, which is independent in constitutional law, with the former 'Land' of Austria, which formed a constituent part of the German Reich. It would be out of place to put the Republic of Austria on the same legal level as the 'Länder' ('Reichsgaue') and communes because the latter lacked all independence in constitutional law, and because during the period of occupation there occurred, broadly speaking, only a change affecting the leading organs thereof, their legal status as such remaining almost entirely unchanged. Any liability of the Republic of Austria in accordance with section 1409 of the General Civil Code (ABGB) must similarly be rejected, on the ground that during the period of occupation financial sovereignty was exercised by the German Reich, and that, more particularly after the abolition of the Austrian Ministry of Finance, any semblance of financial independence had been lost; it cannot be assumed, therefore, that the purchase price paid by the applicants to the 'Land' of Austria remained in the territory of Austria and benefited the reconstituted Republic of Austria. . . .

"For these reasons the complaints raised on appeal must be rejected."

[Report: *Ev. Bl.* 1951, No. 83.]

States—Continuity of—Annexation of Austria by Germany in 1938.

See Case No. 97 (*Z.* v. *B.*).

VI.—Extinction of States

States—Extinction of—Question of Extinction of Republic of Czechoslovakia in 1939.

See Case No. 114 (*Valk* v. *Kokes*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

I.—Unions of States

ii.—Other Unions (including Customs Unions)

Case No. 12 **States—Economic Union—Effect on Independence—Status of Saar.**

Société Koehl et Cie *v.* Hildebrand.

France, Court of Appeal of Colmar. June 23, 1950.

The Facts.—This was an action by a French company against a national of the Saar. The action had been instituted in France in reliance on Article 14 of the Civil Code which provides that aliens resident abroad may be cited before French tribunals in respect of obligations contracted towards French nationals. The only exception to the principle recognized in that Article which has been permitted in practice concerns cases where the Courts of the country where the alien resides are assimilated to French courts. It was contended on behalf of the defendant that that requirement was complied with in the case of the Saar. The Court of first instance of Strasbourg, in a judgment of July 28, 1949, upheld that view. It pointed out, in this connection, that the Convention between France and the Saar of January 3, 1948, concerning the judicial organization of the Saar, provided that the rules of procedure applicable in the Saar would give French nationals the same guarantees as those which they enjoyed in France. The plaintiff now appealed.

Held : that the appeal must be upheld. The courts of the Saar were not assimilated to those of France. The plaintiff was therefore entitled to rely on Article 14 of the Civil Code. The Court said :

" An alien can escape the effects of the rule laid down in Article 14 of the Civil Code only if he can invoke a treaty exempting him from its application. The Convention concerning the judicial organization of the Saar, of 3 January 1948, makes no reference to Article 14 of the Civil Code in the relations between the two countries. As shown in Article 1 of that Convention, its purpose is to determine the judicial consequences of the financial, economic and customs union between France and the Saar. It cannot be maintained that by that Convention the judicial system of the Saar was assimilated to that of France. On the contrary, Article 2 of the Convention provides that the Assembly and the Government of the Saar are alone competent, within the framework of its status and Constitution, to regulate the organisation of the courts and judicial procedure.

" A Franco-Sarrois division of the Court of Appeal of the Saar has been established. However, the competence of that division, and of the French judges seconded to the Saar, is strictly limited by the provisions of the Convention. It does not extend, in any case, to disputes such as the one now before the Court.

" The Saar, despite its financial, economic and customs link with France, is a foreign country, with its own Constitution, its own Government and its own legislative assembly. Its inhabitants have an independent nationality."

[Report : *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 62.]

NOTE.—See, to the same effect, *Kreisversicherungsanstalt* v. *Société Générale Alsacienne de Banque* (*Revue critique de Droit international privé*, vol. 39 (1950), p. 438), decided by the same Court on November 9, 1949.

Unions of States—Economic Unions—Freedom of Trade within Unions—Meaning of.

See Case No. 3 (*Huberty* v. *Public Prosecutor*).

Unions of States—Personal and Real Unions—Netherlands Indonesian Union—Nationality in.

See Case No. 26 (*In re Andries* (*Franchise Case*)).

II.—British Commonwealth of Nations

British Commonwealth of Nations—Whether Court in One Dominion has Power to Order Transfer of a Suit to a Court in Another Dominion—Indian Independence—Effect of. **Case No. 13**

ABDUL MOTALEB *v.* HASAN BANU BIBI.

India, High Court, Calcutta, Original Civil Jurisdiction.
(S. R. Das Gupta J.) *March* 15, 1949.

THE FACTS.—Abdul Motaleb applied to the High Court in Calcutta for the re-transfer of his partition suit against Hasan Bibi to the Court at Dacca, in Eastern Pakistan. He had commenced his action in the latter Court in 1944, but the judge thereof had, at that time, directed it be transferred for trial to the Court in Calcutta. The application was opposed on the ground that a Court sitting in India had no jurisdiction to order the transfer of a suit to any Court in Pakistan. The

Case No. 13 *Contd.*

independence of India and the splitting of the sub-continent into two independent Dominions had intervened between the commencement of the case in 1944, and its present hearing in 1949.

For the plaintiff it was argued that the Court still possessed such jurisdiction by virtue of the High Court (Bengal) Order, 1947, and the Code of Civil Procedure, 1908. The relevant clause of the former reads :

" 13. (1). Subject as hereinafter provided, the High Court in Calcutta shall have no jurisdiction in respect of the territories for the time being included in the Province of East Bengal. . . .

" (2). Notwithstanding anything contained in this order :—

(*a*). any proceedings which, immediately before the appointed day, are pending in the High Court in Calcutta on its Original Side, including any proceedings then pending in the said High Court as a Court of reference, shall be heard and determined by that Court. . . .

" (4). Subject to the following provisions of this Article with respect to appeals, any order made by the High Court in Calcutta either—

(*a*) before the appointed day ; or

(*b*) in any proceedings with respect to which the said High Court retains jurisdiction by virtue of paras. (2) and (3) of this Article :

shall for all purposes have effect not only as an order of the High Court in Calcutta but also as an order made by the High Court of East Bengal."

The Code of Civil Procedure, s. 24 (1) (*b*) (iii), reads :

" (1). On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(*a*) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or

(*b*) withdraw any suit, appeal or other proceeding pending in any court subordinate to it, and—

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn."

Held: that the application must be dismissed. The Court had no jurisdiction to order the transfer of the case to a Court in another independent State. The Court said :

" It appears that because of the provisions of cl. 13 (1) of the High Court (Bengal) Order, 1947, this Court would have no jurisdiction in respect of the territories for the time being included in the Province of East Bengal. By that it is meant that properties and land which fall within the Province of East Bengal would be excluded from the jurisdiction of this Court. It also implies to my mind that this Court will have no jurisdiction over the Courts which are functioning in the Province of East Bengal. But some exception is made to this position in cl. 13 (2) of the said Order. One of such exceptions is contained in cl. 13 (2) (*a*) which I have enumerated. Now, the effect of that clause to my mind is that this High Court has got jurisdiction over suits which are pending on the Original Side from before the appointed day, but that jurisdiction is to hear and determine such suits and, in exercise of that jurisdiction, if this Court makes an order, then, under cl. 13 (4) (*b*), that order would have effect not only as an order made by the High Court in Calcutta but by the High Court of Bengal. As I have said, the only jurisdiction of this Court is to hear and determine the suits which are referred to under cl. 12 (2) (*a*) and (*b*) and if any order is made by this Court in the exercise of that jurisdiction, namely, in hearing and determining that suit, that would have effect as an order made by the High Court, East Bengal. The order which is asked for . . . is an order which cannot be said to be an order which can be made in the exercise of that jurisdiction. . . .

" With regard to s. 24 (1) (*b*) (iii) of the Code of Civil Procedure, I am also of opinion that, even under that section, I would have no jurisdiction to make the order asked for.

" Section 24 (1) (*b*) of the Code of Civil Procedure speaks of the right of this Court to withdraw any suit, appeal, or other proceedings pending in any Court subordinate to it and sub-cl. (iii) of cl. (*b*) of that section speaks of the right to re-transfer the same for trial or disposal to the Court from which it was withdrawn. . . . In my view, the power to withdraw must be of a suit, appeal or proceeding pending in a Court, which is subordinate to the Court which makes the order and the power to re-transfer must also be only to such subordinate Court. Mr. Gupta (for the defence) has also drawn my attention to certain provisions of the Indian Independence Act and he has placed before me s. 1 of the said Act where it is stated as follows :

" ' (1). As from the fifteenth day of August, nineteen hundred and forty-seven, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan.

" ' (2). The said Dominions are hereafter in this Act referred to as " the new Dominions ", and the said fifteenth day of August is hereafter in this Act referred to as the " appointed day ".' "

" He also placed before me s. 8 (2) of the said Act, where it is stated as follows :

" ' 8. (2). Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly

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of the Dominion under sub-s. (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders-in-Council, Rules and other Instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly:

" ' Provided that—

' (*a*). the said provisions shall apply separately in relation to each of the new Dominions and nothing in this sub-section shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions. . . .'

" It appears that after the Indian Independence Act, the two Dominions have acquired two separate independent statuses and the laws of one Dominion are not applicable to another Dominion. The law which is prevalent in the Dominion of India is the law of the Dominion of India, and the law which is prevalent in Pakistan is the law of Pakistan, and one has no bearing on the other. It is true that the Civil Procedure Code is applicable now to both this country and also to Pakistan, but the Civil Procedure Code as administered in India is the law of India and the Civil Procedure Code as administered in Pakistan is the law of Pakistan. But it is abundantly clear that one Dominion has got a status separate and independent from another Dominion and it cannot be said that any Court of this country has any jurisdiction whatsoever over the Court in another country. . . . Transferring a case from this Court to Dacca Court would mean exercising a jurisdiction over Dacca Court, in other words, that would be imposing something over the Dacca Court which I have no right to do."

[Report: (1950), I.L.R. 1 Calcutta 430.]

NOTE.—Similar problems were discussed by the High Court of Calcutta in *Naresh Chandra* v. *Sachindra Nath* (A.I.R. (37) 1950 Calcutta 8), in relation to the jurisdiction of the Court to hear an appeal from a Court at Alipore. The proceedings, for the recovery of arrears of rent, had been commenced in a Court at Jessore. Judgment was given for the plaintiff, and the case was transferred to a Court at Alipore for execution of the decision. The judgment-debtor raised certain further objections before the Alipore Court, but these were overruled. He appealed to the High Court at Calcutta. The appeal was presented on July 3, 1947, and at that time there was no doubt that the Court possessed jurisdiction to hear the case. But shortly thereafter the Indian Independence Act was passed, and, from August 15, 1947, Jessore (where the case was originally heard) became part of East Bengal in Pakistan, within the jurisdiction of the newly constituted Dacca High Court. It was contended that this present appeal must be deemed to have been transferred to the Dacca Court.

The High Court (Bengal) Order stated (s. 13, sub-s. (3)) that any appeals pending before the Calcutta Court on August 15, 1947, should, if "the Court of origin is, as from that day situated in the Province of East Bengal, stand transferred by virtue of this order to the High Court of East Bengal". Construing this provision, the Court came to the conclusion that it still possessed jurisdiction as the "Court of origin", with reference to this appeal, was the Alipore Court, not the Court at Jessore. The Court referred to the principle of effectiveness of jurisdiction (*per* Mookerjee J.): "The execution proceedings out of which the present appeal arises are now pending in the Alipore Court and the Dacca High Court can have no jurisdiction to issue any direction on the Alipore Court which is under the jurisdiction of this High Court. The question whether the Alipore Court can or cannot proceed to levy execution by appointing a receiver over properties situate within the jurisdiction of the Alipore Court cannot be effectively decided by the Dacca High Court. From the practical point of view it is this High Court alone which can pass an effective order on the Alipore Court. . . ."

British Commonwealth of Nations—Admission from other Parts of the Commonwealth—" Prohibited Immigrants " from the United Kingdom—The Law of South Africa.

See Case No. 65 (*Van Rensburg* v. *Ballinger*).

III.—Protected and Vassal States and Protectorates

Protectorates—Status of French Zone of Morocco and Tunis—Whether Integral Part of France for Purpose of Application of French Legislation. **Case No. 14**

MINISTÈRE PUBLIC *v.* DAME NICOLEAU.

France, Court of Appeal of Rabat (Morocco). June 28, 1950.

THE FACTS.—Article 8 of the French law of August 10, 1927, concerning nationality provided that a French woman lost her nationality on marriage if she acquired the nationality of her husband and if the first matrimonial home was outside France. Dame Nicoleau, who was born in Morocco of French parents and who thus had French nationality, in 1931 married a German national and thereby acquired German nationality. The first matrimonial home was in Morocco. It was now contended on her behalf that she had retained French nationality since Morocco could not be considered to be outside France in the meaning of the law of 1927.

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Held: that Dame Nicoleau had lost French nationality on marriage. The Court said:

"Despite French sovereignty in Morocco, Moroccan territory is not identical with French territory. While birth or residence in the French zone of Morocco has the same effect as birth or residence in France, this is so only with respect to certain questions concerning the acquisition of French nationality, and is the result of legislative provision derogating from general rules of law in the matter. No law provides that, in respect of the provisions concerning loss of French nationality on marriage, the French Zone of Morocco cannot be considered to be 'outside France'."

[Report: *Revue critique de Droit international privé*, vol. 40 (1951), p. 625.]

NOTE.—See, to the same effect, *In re Buttigieg, épouse Diodoro* (*ibid.*, p. 622), a decision of the Court of Appeal of Tunis of July 6, 1949, concerning the nationality of a French woman who married an alien and whose first matrimonial home was Tunis. The Court there said: "While the French legislature was able, by virtue of the special status of the Regency—a territory subject to the sovereignty both of the Bey and of France—to decide that residence or birth in France and in Tunis should in certain circumstances produce the same effects, it never referred to these two territories by the same expression. The law of 1927 speaks of residence 'in France' and 'on French territory' without ever assimilating residence in France to residence in the colonies under the authority of the Ministry for Colonies and in the protectorates. In fact, according to Article 15 of the law, it applies only to France and to Algeria, Guadeloupe, Martinique and Reunion, *i.e.* to the territories which, by virtue of the Senatus-consultus of May 3, 1854, have the same legislative system."

IIIa.—Dependent Territories

Case No. 15

Dependent Territories—Chapter XI of the Charter of the United Nations—Effect of United States Legislation in Puerto Rico—Status of Residents of Puerto Rico—Liability to Military Service in United States Forces—Effect of a Resolution of the International Conference of American States.

RUIZ ALICEA *v.* UNITED STATES.

United States, Court of Appeals of the First Circuit.
March 10, 1950.

THE FACTS.—The appellant, a native and resident of Puerto Rico and as such a citizen of the United States, was convicted and sentenced for having knowingly failed to register for military service with the United States Forces, as provided in the Selective Service Act, 1948 (50 U.S.C.A. Appendix, sections 451 *et seq.*). On appeal against conviction and sentence it was contended on his behalf, *inter alia*, that the Peace Treaty concluded between the United States and Spain at the conclusion of the Spanish-American War was void in so far as it purported to cede Puerto Rico to the United States, and that therefore the United States legislature could not validly legislate for Puerto Rico so as to make the Selective Service Act applicable to residents of Puerto Rico, the more so as Puerto Rico was not represented in the United States Congress. On behalf of the United States Government it was contended that since the ratification of the Peace Treaty Puerto Rico had always been regarded as United States territory and that the fact that it was not represented in Congress was immaterial.

Held: that Puerto Rico was United States territory and that the Congress of the United States was entitled to legislate for Puerto Rico, regardless of whether or not Puerto Rico was represented therein; that power to legislate for Puerto Rico included power to provide for the liability of residents of Puerto Rico to military service in the United States Forces and that the judgment of the court of first instance must accordingly be affirmed. The Court said:

" Miguel Angel Ruiz Alicea, a native and resident of Puerto Rico, and as such a citizen of Puerto Rico and of the United States, was convicted and sentenced in the United States District Court for the District of Puerto Rico for violation of the Selective Service Act of 1948, 62 Stat. 604, 50 U.S.C.A. Appendix, s. 451 *et seq.*, in that he knowingly failed and neglected to present himself for and submit to registration as required by ss. 3 and 12 (*a*) of said Act, and of the President's Proclamation No. 2799 thereunder, 13 F.R. 4173, 50 U.S.C.A. Appendix, s. 453 note.

" The only question before us is whether the district court erred in denying an elaborate motion by the defendant that the indictment be quashed and the case dismissed ' on the ground that this Court lacks jurisdiction over the defendant because the Selective Service Law is not legally applicable to Puerto Rico '. We hold that the motion was properly denied.

" So far as the intention of Congress is concerned, it is clear that the Selective Service Act of 1948, by its express terms, is applicable to Puerto Rico. See s. 3 and s. 16 (*a*) and (*b*). Appellant does not contend to the contrary.

" However, appellant argues at length in his brief, though the point was not specifically made in the motion to quash, that the Treaty of Paris, 30 Stat. 1754, ratified by Spain and the United States at the conclusion of the Spanish-American War, was and is null and void in so far as Spain purported therein to cede Puerto Rico to the United States. As far back as 1901, in *De Lima* v. *Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041, the Supreme Court of the United States

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recognized the validity of the treaty in holding, 182 U.S. at page 196, 21 S.Ct. at page 752 that ' by the ratification of the treaty of Paris the island became territory of the United States, although not an organized territory in the technical sense of the word ' ; and since then the cases dealing with the legislative powers of Congress over Puerto Rico have without exception proceeded on that basis. Appellant could hardly expect us, as an intermediate appellate court, to undertake to overrule a half-century of history. Besides, the historical and juridical arguments which appellant has advanced in this connection have been fully and convincingly demolished. See José López Baralt, Is the Paris Treaty Null ' Ab Initio ' as to the Cession of Puerto Rico ?, 6 Revista de Derecho, Legislación y Jurisprudencia del Colegio de Abogados de Puerto Rico, p. 60 (1941).

" It is further contended that Puerto Rico has no voting representation in the Congress of the United States ; that it occupies a status inferior to that of ' incorporated ' territories, such as Hawaii and Alaska, and thus ' is not entitled to enjoy equality of rights with the states nor with incorporated territories, which are on the way to become states ' ; that therefore the imposition of compulsory military service on residents of Puerto Rico ' is a violation of the basic constitutional principle that equality of duties is based on equality of rights '.

" In *People of Puerto Rico* v. *Shell Co.*, 1937, 302 U.S. 253, 261–262, 58 S.Ct. 167, 171, 82 L.Ed. 235, the Court said : ' The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. . . . The effect was to confer upon the territory many of the attributes of *quasi* sovereignty possessed by the states —as, for example, immunity from suit without their consent. . . . By those acts, the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial—was erected. " A body politic "—a commonwealth—was created. 31 Stat. 79, s. 7, c. 191 (48 U.S.C.A. s. 733). The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And, so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures.'

" Evolution in the direction of greater local autonomy is evident in the amendment of the Organic Act by the Act of August 5, 1947, 61 Stat. 770, 48 U.S.C.A. ss. 737, 771–772, 775, 793*b*, 797, under which the people of Puerto Rico were given the right to choose their own governor by popular suffrage

—a right never before accorded to a territory of the United States. There is no reason to suppose that the evolutionary process is now at an end. Certainly nothing in the development to date would preclude the possibility of ultimate statehood. On the other hand, perhaps Puerto Rico will eventually achieve some unique status under the American flag more satisfactory to its people than statehood.

" Whatever may be the future status of Puerto Rico, it is clear that in the present situation Congress has power to impose compulsory military service under an Act applicable, without discrimination, to citizens of the United States resident in Puerto Rico as well as to citizens of the United States resident in other territories and in the States of the Union. See Selective Draft Law Cases (*Aver* v. *U.S.*), 1918, 245 U.S. 366, at page 378, 38 S.Ct. 159, at page 161, 62 L.Ed. 349, L.R.A. 1918C, 361, Ann. Cas. 1918B, 856, in which the Court said : ' It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it '. See also *United States* v. *Henderson*, 7 Cir., 1950, 180 F. 2d 711. That Puerto Rico now has no voting representation in Congress is of no significance in this connection ; the same is true of the District of Columbia, and it is not suggested that Congress lacks power to draft into the armed forces citizens of the United States resident in the District of Columbia. In fact, Congress may draft aliens resident in the United States, though they may not be entitled to vote for election of representatives in Congress, or even to participate in state or municipal elections. *United States* v. *Lamothe*, 2 Cir., 1945, 152 F. 2d 340 ; *Leonhard* v. *Eley*, 10 Cir., 1945, 151 F. 2d 409.

" A further argument is drawn from the ratification by the United States of the Charter of the United Nations, 59 Stat. 1031. Under Chapter XI, Article 73, of this international treaty, the United States and other members of the United Nations who have assumed responsibilities ' for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories '. To this end, the Administering States accept the obligation to ensure the ' just treatment ' of the inhabitants of such territories ' and their protection against abuses ' ; ' to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions ' ; to further international peace and security ; to

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promote constructive measures of development in social, economic, and scientific fields; and to transmit regularly to the Secretary-General for information purposes ' statistical and other information of a technical nature relating to economic, social, and educational conditions ' in said non-self-governing territories. Whether or not Puerto Rico is a territory whose people ' have not yet attained a full measure of self-government ', within the meaning of Article 73, nevertheless the United States has, without raising the point, in fact regularly transmitted to the Secretary-General information of the sort described with reference to Puerto Rico.

" It is contended that the imposition of compulsory military service on Puerto Rico ' is to the detriment of the interests of the people of Puerto Rico and to the sole benefit of the United States ', and hence is in violation of the obligation of the United States, under the treaty, to give paramount regard to the interests of the inhabitants of the territory. We think this is obviously not so. In accepting the obligation to promote the well-being of the people of Puerto Rico, the United States presumably would be expected to protect the inhabitants of the island from subjugation by a hostile power. It would therefore seem not to be unjust, or to the detriment of the people of Puerto Rico, to require their service in the armed forces of the United States on an equal basis with residents of continental United States.

" Moreover the argument fails, because Chapter XI of the Charter, in contrast with Chapter XII, describing the International Trusteeship System, and Chapter XIII, establishing the Trusteeship Council, provides no machinery for international supervision and control of the administration of non-self-governing territories. Article 73, upon ratification of the Charter by the United States, did not have the legal effect of altering the domestic status of Puerto Rico under the Constitution of the United States, or of curtailing the constitutional power of Congress to legislate with reference to such territory.

" Finally, appellant seeks support in a resolution with reference to Puerto Rico adopted at a meeting last year in Havana, Cuba, of the American Committee on Dependent Territories, constituted pursuant to Resolution No. XXXIII of the Final Act of the Ninth International Conference of American States at Bogotá, Colombia, May 2, 1948. The resolution in question seems to have gone beyond the competence of the American Committee on Dependent Territories, which was assigned the general function of seeking pacific means of eliminating ' colonialism and the occupation of American territories by extra-continental countries '. Furthermore, appellant has failed to point out upon what theory a court of the United States would be justified in recognizing a resolution of that Committee as having the slightest legal effect upon the status of Puerto Rico under the American flag."

[Report: 180 F. 2d 870.[1]]

NOTE.—On January 19 and March 20, 1953, the Government of the United States transmitted to the Secretary-General of the United Nations the text of the new Constitution of the Commonwealth of Puerto Rico. The Eighth Session of the General Assembly adopted a Resolution (748 (III)) stating, *inter alia*, that the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter, including the transmission of information under Article 73*c*, no longer applied to the Commonwealth of Puerto Rico.

IV.—Mandates

i.—Status of the Mandated Territories

International Mandates—Nature of—Treaties Creating International Status—Mandates and Trusteeship—Interpretation of Treaties—Relevance of Declarations of the Parties—The Mandate for South-West Africa. **Case No. 16**

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA.

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo, Judges.)

Advisory Opinion of June 11, 1950.

THE FACTS.—On December 6, 1949, the General Assembly of the United Nations adopted a Resolution in which the International Court of Justice was asked to give an Advisory Opinion on the following questions:

"What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

"(*a*) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?

"(*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?

"(*c*) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?"

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[1] See also *Miranda and Others* v. *United States*, a judgment of the same Court, delivered on the same date: 180 F. 2d 873.

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The relevant facts underlying the request for the Advisory Opinion appear from the various parts of the Opinion as reported below.

Held :

" *On the General Question* : unanimously, that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920 ;

" *On Question* (*a*) : by twelve votes to two, that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court ;

" *On Question* (*b*) : unanimously, that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System ; and by eight votes to six, that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System ;

" *On Question* (*c*) : unanimously, that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations " (at pp. 143–144).

I. *The Nature of International Mandates.*

" The Territory of South-West Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers. When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914–1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance : the principle of non-annexation and the principle that the well-being and development of such peoples form ' a sacred trust of civilization '.

" With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations. A ' tutelage ' was to be established for these peoples, and this tutelage was to be entrusted to certain advanced nations and exercised by them ' as mandatories on behalf of the League '.

" Accordingly, the Principal Allied and Associated Powers agreed that a Mandate for the Territory of South-West Africa should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa and proposed the terms of this Mandate. His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with the proposed terms. On December 17th, 1920, the Council of the League of Nations, confirming the Mandate, defined its terms.

" In accordance with these terms, the Union of South Africa (the ' Mandatory ') was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled.

" The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

" It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a ' mandator ' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The ' Mandate ' had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an

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international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa.

" The essentially international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it ; it also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

" The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

" These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the ' securities for the performance of this trust ' referred to in the same article.

" The first-mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

" These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

" This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System " (at pp. 131–134).

II. *The Continuation of the Mandates Subsequent to the Dissolution of the League of Nations.*

" This view results, moreover, from the Resolution of the League of Nations of April 18th, 1946, which said :

> ' Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization :
>
> . . . . . .
>
> ' 3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League.
>
> ' 4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.'

" As will be seen from this resolution, the Assembly said that the League's functions with respect to mandated territories would come to an end ; it did not say that the Mandates themselves came to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective

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Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until ' other arrangements ' were established " (at p. 134).

III. *Effect of Recognition by the Government Concerned of the Continuance of Obligations.*

" A similar view has on various occasions been expressed by the Union of South Africa. In declarations made to the League of Nations, as well as to the United Nations, the Union Government has acknowledged that its obligations under the Mandate continued after the disappearance of the League. In a declaration made on April 9th, 1946, in the Assembly of the League of Nations, the representative of the Union Government, after having declared his Government's intention to seek international recognition for the Territory of South-West Africa as an integral part of the Union, stated : ' In the meantime, the Union will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate for the advancement and promotion of the interests of the inhabitants as she has done during the past six years when meetings of the Mandates Commission could not be held '. After having said that the disappearance of the Mandates Commission and of the League Council would ' necessarily preclude complete compliance with the letter of the Mandate ', he added : ' The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory.'

" In a memorandum submitted on October 17th, 1946, by the South-African Legation in Washington to the Secretary-General of the United Nations, expression was given to a similar view. Though the League had at that time disappeared, the Union Government continued to refer to its responsibility under the Mandate. It stated : ' This responsibility of the Union Government as Mandatory is necessarily inalienable.' On November 4th, 1946, the Prime Minister of the Union, in a statement to the Fourth Committee of the United Nations General Assembly, repeated the declaration which the representative of the Union had made previously to the League of Nations.

" In a letter of July 23rd, 1947, to the Secretary-General of the United Nations, the Legation of the Union referred to a resolution of the Union Parliament in which it was declared ' that the Government should continue to render reports to the

United Nations Organization as it has done heretofore under the Mandate '. It was further stated in that letter: 'In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate '.

" These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court " (at pp. 134–136).

IV. *Succession of the United Nations to the Supervisory Function of the League of Nations.*

" Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.

" The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.

" These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without

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international supervision and a duty to render reports to a supervisory organ.

" The Assembly of the League of Nations, in its Resolution of April 18th, 1946, gave expression to a corresponding view. It recognized; as mentioned above, that the League's functions with regard to the mandated territories would come to an end, but noted that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant. It further took note of the intentions of the mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the mandatory Powers. This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations.

" The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949.

" For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

" The right of petition was not mentioned by Article 22 of the Covenant or by the provisions of the Mandate. But on January 31st, 1923, the Council of the League of Nations adopted certain rules relating to this matter. Petitions to the League from communities or sections of the populations of mandated territories were to be transmitted by the mandatory Governments, which were to attach to these petitions such comments as they might consider desirable. By this innovation the supervisory function of the Council was rendered more effective.

" The Court is of opinion that this right, which the inhabitants of South-West Africa had thus acquired, is maintained by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the

Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them.

" It follows from what is said above that South-West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions " (at pp. 136–138).

V. *Continuance of Judicial Supervision by the International Court of Justice.*

" According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions " (at p. 138).

VI. *Obligation to Place Territories under the System of Trusteeship.*

" Territories held under Mandate were not by the Charter automatically placed under the new International Trusteeship System. This system should, according to Articles 75 and 77, apply to territories which are placed thereunder by means of Trusteeship Agreements. South-West Africa, being a territory held under Mandate (Article 77(a)), may be placed under the Trusteeship System in accordance with the provisions of Chapter XII. In this sense, that chapter is applicable to the Territory.

" Question (*b*) further asks in what manner Chapter XII is applicable to the Territory. It appears from a number of documents submitted to the Court in accordance with the General Assembly's Resolution of December 6th, 1949, as well as from the written and the oral observations of several Governments, that the General Assembly, in asking about the manner

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of application of Chapter XII, was referring to the question whether the Charter imposes upon the Union of South Africa an obligation to place the Territory under the Trusteeship System by means of a Trusteeship Agreement.

" Articles 75 and 77 show, in the opinion of the Court, that this question must be answered in the negative. The language used in both articles is permissive (' as may be placed thereunder '). Both refer to subsequent agreements by which the territories in question may be placed under the Trusteeship System. An ' agreement ' implies consent of the parties concerned, including the mandatory Power in the case of territories held under Mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party. Article 77, paragraph 2, moreover, presupposes agreement not only with regard to its particular terms, but also as to which territories will be brought under the Trusteeship System.

" It has been contended that the word ' voluntarily ', used in Article 77 with respect to category (*c*) only, shows that the placing of other territories under Trusteeship is compulsory. This word alone cannot, however, over-ride the principle derived from Articles 75, 77 and 79 considered as a whole. An obligation for a mandatory State to place the Territory under Trusteeship would have been expressed in a direct manner. The word ' voluntarily ' incorporated in category (*c*) can be explained as having been used out of an abundance of caution and as an added assurance of freedom of initiative to States having territories falling within that category.

" It has also been contended that paragraph 2 of Article 80 imposes on mandatory States a duty to negotiate and conclude Trusteeship Agreements. The Court finds no justification for this contention. The paragraph merely states that the first paragraph of the article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77. There is nothing to suggest that the provision was intended as an exception to the principle derived from Articles 75, 77 and 79. The provision is entirely negative in character and cannot be said to create an obligation to negotiate and conclude an agreement. Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.

" It has further been maintained that Article 80, paragraph 2, creates an obligation for mandatory States to enter into negotiations with a view to concluding a Trusteeship Agreement. But an obligation to negotiate without any obligation to conclude an agreement can hardly be derived from this provision, which expressly refers to delay or postponement of 'the negotiation and conclusion' of agreements. It is not limited to negotiations only. Moreover, it refers to the negotiation and conclusion of agreements for placing 'mandated and other territories under the Trusteeship System as provided for in Article 77'. In other words, it refers not merely to territories held under Mandate, but also to the territories mentioned in Article 77 (*b*) and (*c*). It is, however, evident that there can be no obligation to enter into negotiations with a view to concluding Trusteeship Agreements for those territories.

" It is contended that the Trusteeship System created by the Charter would have no more than a theoretical existence if the mandatory Powers were not under an obligation to enter into negotiations with a view to concluding Trusteeship Agreements. This contention is not convincing, since an obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. Nor was the Trusteeship System created only for mandated territories.

" It is true that, while Members of the League of Nations regarded the Mandates System as the best method for discharging the sacred trust of civilization provided for in Article 22 of the Covenant, the Members of the United Nations considered the International Trusteeship System to be the best method for discharging a similar mission. It is equally true that the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System. It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

" For these reasons, the Court considers that the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System " (at pp. 138–140).

VII. *Modification of the Status of Mandated Territories. Effect of Unilateral Declarations of the Mandatory State.*

" The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules. This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate.

" The Court is further requested to say where competence to determine and modify the international status of the Territory rests.

" Before answering this question, the Court repeats that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement in accordance with the provisions of Chapter XII of the Charter.

" The competence to modify in other ways the international status of the Territory depended on the rules governing the amendment of Article 22 of the Covenant and the modification of the terms of the Mandate.

" Article 26 of the Covenant laid down the procedure for amending provisions of the Covenant, including Article 22. On the other hand, Article 7 of the Mandate stipulates that the consent of the Council of the League was required for any modification of the terms of that Mandate. The rules thus laid down have become inapplicable following the dissolution of the League of Nations. But one cannot conclude therefrom that no proper procedure exists for modifying the international status of South-West Africa.

" Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question (*a*), those powers of supervision now belong to the General Assembly of the United Nations. On the other hand, Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System. This conclusion is strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power.

" On January 22nd, 1946, before the Fourth Committee of the General Assembly, the representative of the Union of South Africa explained the special relationship between the Union and the Territory under its Mandate. There would—he said—be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. He continued : ‘ When that had been done, the decision of the Union would be submitted to the General Assembly for judgment.’

“ On April 9th, 1946, before the Assembly of the League of Nations, the Union representative declared that ‘ it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union ’.

“ In accordance with these declarations, the Union Government, by letter of August 12th, 1946, from its Legation in Washington, requested that the question of the desirability of the territorial integration in, and the annexation to, the Union of South Africa of the mandated Territory of South-West Africa, be included in the Agenda of the General Assembly. In a subsequent letter of October 9th, 1946, it was requested that the text of the item to be included in the Agenda be amended as follows : ‘ Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated Territory, and implementation to be given to the wishes thus expressed ’.

“ On November 4th, 1946, before the Fourth Committee, the Prime Minister of the Union of South Africa stated that the Union clearly understood ‘ that its international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South-West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs ’.

“ By thus submitting the question of the future international status of the Territory to the ‘ judgment ’ of the General Assembly as the ‘ competent international organ ’, the Union Government recognized the competence of the General Assembly in the matter.

“ The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union showed the recognition of the interest and concern of the United Nations in the matter. It expressed the desire ‘ that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the Mandated Territory of South-West Africa ’, and concluded : ‘ The General Assembly, therefore, is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa ’.

“ Following the adoption of this resolution, the Union

Case No. 16 *Contd.* Government decided not to proceed with the incorporation of the Territory, but to maintain the *status quo*. The General Assembly took note of this decision in its Resolution 141 (II) of November 1st, 1947.

" On the basis of these considerations, the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations " (at pp. 141–143).

[Report : *I.C.J. Reports*, 1950, p. 128.]

NOTE.—Judges Sir Arnold McNair and Read, in Separate Opinions, expressed disagreement with that part of the Opinion in which the Court held that the United Nations succeeded to the functions of supervision previously exercised by the League of Nations. They were of the view that the Union of South Africa was not bound to transmit reports to and submit to the supervision of the United Nations.

Judges Alvarez, De Visscher and Krylov appended Dissenting Opinions—mainly on the ground that, in their view, the Union of South Africa was under a legal obligation to enter into negotiations with the view to concluding a Trusteeship Agreement. This also was the view of Judges Guerrero, Zoričić and Badawi Pasha.

D—RECOGNITION

[See also above, A. IV, *Recognition of Acts of Foreign States and Governments* ; and Part IV, JURISDICTION : A. I, *Territorial.*]

I.—Of States

States—Recognition of—Absence of Formal Recognition—Right to Sue—Republic of the South Moluccas.

See Case No. 39 (*Republic of the South Moluccas* v. *Royal Packet Shipping Co.*).

Recognition of States—Effect of Non-Recognition of Israel by Egypt—Belligerent Rights of Egypt.

See Case No. 149 (*The Flying Trader*).

Recognition of States—Effect of Non-Recognition—Belligerent Parties—Non-Recognition of Israel by Egypt.

See Case No. 108 (*The Fjeld*).

II.—Of Governments

Recognition of Governments—Effects of Non-Recognition—Conflicting Claims to Assets in Foreign Country—Conclusive Nature of Decision of Executive as to Recognition—Preservation of *Status Quo* of Assets—Non-Recognition by the United States of the Government of the People's Republic of China. **Case No. 17**

BANK OF CHINA *v.* WELLS FARGO BANK & UNION TRUST COMPANY.

United States, District Court for the Northern District of California. July 17, 1950.

THE FACTS.—The Bank of China, a corporation established under Chinese Law and domiciled in China, had a sum of money standing to its credit in the defendant bank which had its registered office in the United States. The Bank of China was not a public corporation, but two-thirds of its stock were held by the Chinese Government, and thirteen of its twenty-five directors were government appointees, the remaining twelve being elected by private shareholders. In 1949, when a new Government had taken control of the Chinese mainland and the previous government had fled to the Island of Formosa in order there to set up a rival Chinese government, the defendant bank received conflicting instructions regarding the disposal of the assets originally deposited by the Bank of China : Some of the directors of the Bank of China who, in accordance with the original agreement between the Bank of China and the defendant bank, would admittedly have been entitled to give such instructions if conditions had remained normal, claimed to be entitled to the assets, while a body referred to as the " East China Financial and Economic Affairs Administration " claimed that all the powers of the board of directors had been vested in it by the new Government of China, and that it was accordingly entitled to the assets. The only Chinese Government which was recognized by the United States as the legitimate Government of China at the material time was the government which had established itself on the Island of Formosa. The defendant bank, being uncertain as to whether to obey the instructions of one or other of the rival claimants, refused to hand over the assets to either of them whereupon both claimants instituted proceedings.

Held : (i) that, in so far as concerned the claim of the East China Financial and Economic Affairs Administration which, in effect, was a claim put forward by a Government not recognized by the United States, the action must be dismissed, a non-recognized government not being entitled to institute proceedings ;

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(ii) that, in so far as concerned the claim of the directors of the Bank of China who, by virtue of the original agreement between the Bank of China and the defendant bank, would have been entitled to claim the assets, the action must be dismissed on the ground that the directors were unable, having regard to the circumstances of the case, to fulfil the functions entrusted to them by their shareholders ;

(iii) that, as both actions had to be dismissed, the *status quo* must be preserved, either by depositing the assets with the Court, or by placing them in a separate account to be administered by the defendant bank ;

(iv) that, accordingly, the actions should stand adjourned *sine die*. The Court said :

" On May 28, 1949, the Bank of China, in so far as was physically possible, was taken over by the Chinese People's Liberation Army and the powers of its Board of Directors were temporarily vested in the East China Financial and Economic Affairs Administration. This Administration on June 6, 1949, appointed Kung Ying Ping General Manager and Chi Chao Ting and Chan Wu Assistant General Managers. After the overthrow of the Nationalist Government in China and the establishment of the Central People's Government in October, 1949, the powers of the Board of Directors of the Bank of China were transferred temporarily to the Financial and Economic Affairs Commission of the Central Government. Subsequently the People's Government, by virtue of the stock ownership to which it claimed to have succeeded as the successor of the Nationalist Government, appointed new government directors. On December 24, 1949, the People's Government announced that a meeting of the new directors of the Bank of China would be held in Peking upon the arrival of directors elected by the private stockholders. Also on December 24, 1949, the moving attorneys received a cable from Peking signed by Kung Ying Ping, Chi Chao Ting and Chan Wu, the recently appointed managers of the Bank, authorizing them to act as the attorneys for the Bank of China in the present action.

" The attorneys for the émigré directors countered these allegations of fact with the assertion that the Nationalist Government now operating from Formosa is the only government of China recognized by the United States. This Court, they urged, cannot recognize any change in the management of the Bank of China resulting from acts of a government unrecognized by the United States.

" Controversies regarding property rights rendered uncertain by changing governments have produced a myriad of judicial decisions. These decisions present a confusing picture. No area of that picture is more murky than that depicting the effect of the recognition or non-recognition of a new government by the *forum* nation. Research reveals no case, with facts sufficiently similar to those of the present controversy, to be accepted as a controlling precedent. But some general principles may be deduced from prior decisions to shape the approach to the present problem. The first guide post is the not too helpful principle that the action of the political department of the government ' in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them '. *Guaranty Trust Co. of New York* v. *United States*, 1938, 304 U.S. 126, 138, 58 S.Ct. 795, 791, 82 L.Ed. 1224. One of the accepted consequences is that a non-recognized government cannot be recognized by the court as a litigant. *Guaranty Trust Co. of New York* v. *United States, supra*, 304 U.S. at 137, 58 S.Ct. 785, 82 L.Ed. 1224. But, it does not follow that the existence of a non-recognized government must be completely ignored. The courts of the United States have given effect to the acts of a non-recognized, *de facto* government done within the territory it controls and affecting its own nationals. This effect has been given when it has appeared that the most realistic and just result will thus be achieved and that the foreign policy of the executive branch of our government will not be thwarted.

" The funds here in controversy belong to a Chinese corporation, which has weathered previous governmental upheavals. Although by virtue of majority stock ownership, the Government of China controls this corporation, it is not a public corporation nor are its funds government funds. These funds are committed to the accomplishment of the corporate purposes. The corporation was established to carry on a general banking business, including the granting of commercial credits, the discounting of bills and drafts, the purchase and sale of bullion and foreign currencies, the acceptance of deposits and valuables for safekeeping, the collection of bills, and the granting of loans against reliable securities. The bank operates through 200 branches throughout China. It maintains 20 foreign offices for the express purpose of facilitating trade between the Chinese people and the rest of the world. The Bank of China cannot perform its functions while divorced from the Chinese nation. Its depositors, its 5,000 private stockholders, and the Chinese people—who may be characterized as the ultimate owners of the government stockholdings—must live under the government which in fact governs throughout the territorial limits of China.

" The émigré directors of the Bank are now scattered. Some are in New York, others in California, others in Formosa, others in Hong Kong, still others in Shanghai, and Hangchow. The whereabouts of some is unknown. Some of these directors

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represent a government which is not now, and may never again be, in a position to speak for the Chinese people in respect to the manner in which the corporation shall function in China. The others may or may not be the directors whom the private stockholders now desire to speak for them. It is difficult to perceive how the interests of the corporation, its stockholders, and its depositors will be protected by placing the *res* in dispute at the disposal of a group of these directors.

" To deny the émigré directors control of these funds is not to deprive a government, still recognized by the United States, of funds to carry on its fight for survival. For these are corporate funds which should not be dissipated for purposes other than those of the corporation.

" On the other hand, the new management in China is not yet so established as to warrant placing these funds in its hands. Who the private stockholders wish to represent them is at present unknown. The new government directors represent a government, which although in control of the Chinese mainland, has not yet put down all organized resistance. Only time will tell whether this government will become a stable government.

" Furthermore, recent international developments bar any decision of this Court which would place these funds in the control of the new management of the bank in China. For this Court to recognize the acts of the so-called ' People's Government ', in so far as they relate merely to a Chinese corporation which must function under that government, might not necessarily run counter to a merely negative policy of non-recognition on the part of the United States. But, since the announcement of the President on June 27, 1950, that the United States will defend Formosa (the present seat of the *de jure* Chinese government) the policy of the United States appears to be one of active intervention against the aims of the ' People's Government '. Although the Bank of China is a private corporation, the Court must realistically recognize that if the $626,860.07 in controversy were placed in the hands of the new management of the Bank of China, the ' People's Government ' would be aided and abetted.

" The only solution which gives promise of affording protection to the Bank of China, its stockholders, and depositors, and at the same time supporting the foreign policy of the United States, is to leave these funds where they are for the present. A Court cannot justly rule while a controversy is raging, except to maintain the *status quo*. A man fording a turbulent stream carrying valuables, cannot be expected then and there to decide the claims of disputing consignees. It is time enough to make decision when solid ground is reached. In the field of international relations, the story must be complete, the facts must be all in, before the judicial function may be properly exercised. Particularly is this so when events are colored by problems of governmental recognition. *United States* v. *Pink*, 1942, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796. Justice Frankfurter concurring 315 U.S. at 236–237, 62 S.Ct. 552, 86 L.Ed. 796, Justice Stone dissenting 315 U.S. at 256, 62 S.Ct. 552, 86 L.Ed. 796.

" Therefore, the trial of this cause will be continued *sine die.* The defendant, if it desires to preclude any claim against it for interest for the use of the fund, may either deposit the fund in the registry of the Court, or place the same in a separate trust account in form to be approved by the Court.

" The motions for summary judgment, to dismiss and for substitution of attorneys, are severally denied without prejudice."

[Report : 92 F. Supp. 920.]

Recognition of Governments—Retroactive Effect of—Confiscatory Decree by Government Subsequently Recognized—Effect of Decree on Assets Situate in Country According Recognition—Effect in Country Promulgating Confiscatory Decree—Right of Set-off—Sovereign Immunity.

Case No. 18

UNITED STATES *v.* NATIONAL CITY BANK OF NEW YORK *ET AL.*

STEINGUT *ET AL.* *v.* NATIONAL CITY BANK OF NEW YORK.

United States, District Court for the Southern District of New York. May 5, 1950.

THE FACTS.—Some time before 1917 the Russo-Asiatic Bank, a bank incorporated in Tzarist Russia, had a credit account with the defendant bank in New York. On November 7, 1917, the Provisional Government of Russia, which preceded the Soviet Government and which was then recognized by the United States, sold in the United States an issue of Russian Treasury Notes payable in dollars at the defendant bank. The Notes were to mature in May 1918. Some time after November 7, 1917, the Soviet Government assumed control of Russia, and on December 27, 1917, at a time when it was not recognized by the United States, it issued a decree nationalizing all banks incorporated in Russia. The decree further provided that all the assets and liabilities of banks so nationalized were to vest in a Soviet State institution. Subsequently the Soviet Government repudiated all liability on the Treasury Notes issued by the Provisional Government. By virtue of the so-called Litvinov Assignment concluded between Soviet Russia and the United States on November 16, 1933, the Soviet Government transferred to the United States whatever claims

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it might have against the defendant bank. In the same year the United States recognized the Soviet Government. In the present action the United States Government, as assignees of the Soviet Government, claimed to be entitled to the moneys originally standing to the credit of the Russo-Asiatic Bank with the defendant bank. The latter contended that the claim of the United States Government was subject to a set-off of such claims as the defendant bank had against the Soviet Government under the Treasury Notes on which the latter Government had repudiated liability, and that as the claim to such set-off was sufficient to extinguish such claim as the United States Government, as assignees of the Soviet Government, might have against the defendant bank, the claim of the United States Government should be dismissed.

Held : (i) that the recognition accorded to the Soviet Government in 1933 operated retroactively so as to validate the decree nationalizing the Russo-Asiatic Bank as from December 27, 1917, with the result that the Soviet Government must be deemed to have acquired title to the moneys deposited with the defendant bank on that date ;

(ii) that, consequently, the United States Government acquired a valid title to these moneys as from December 27, 1917 ;

(iii) that, in so far as concerned the right of the defendant bank to a set-off, the liability of the Provisional Government under the Treasury Notes became the liability of the Soviet Government on the date when the latter assumed control of Russia, viz. at some time between November 7, 1917, and December 27, 1917 ;

(iv) that the repudiation by the Soviet Government of its liability under the Treasury Notes was of no legal effect in the United States because, the Treasury Notes being payable in the latter country, all questions of liability were governed by the law of the United States, and not by the law of the Soviet Union ;

(v) that the claim of the defendant bank to a set-off was not defeated by the sovereign immunity of the Soviet Government, such immunity being immunity from suit only and not immunity from the application of the law of the *forum* ;

(vi) that, in the result, the defendant bank was entitled to set off against the claim of the United States Government to payment of the sums originally standing to the credit of the Russo-Asiatic Bank the sum owing to the defendant bank by the Soviet Government under the Treasury Notes issued by the Provisional Government of Russia, and that as the sum to be set off against the claim of the United States Government was sufficient to extinguish the claim, the action of the United States Government must be dismissed. The Court said :

" I begin with the acceptance of the plaintiff's major premise : that by virtue of the recognition of the Soviet régime in 1933, the validity of the Soviet banking decrees must be retroactively acknowledged. *U.S.* v. *Pink*, 1942, 315 U.S. 203, 62 S.Ct. 552, 86 L. Ed. 796 ; *Steingut* v. *Guaranty Trust Co.*, D.C.S.D.N.Y., 1944, 58 F. Supp. 623, affirmed 2 Cir., 1947, 161 F. 2d 571, *certiorari* denied 1947, 332 U.S. 807, 68 S.Ct. 106, 92 L.Ed. 385. It follows that on December 27, 1917, Soviet Russia became the owner of the Russo-Asiatic account at National City Bank. Had National City Bank on that day possessed the necessary prescience it would have altered the name of its depositor from Russo-Asiatic to that of State Bank of Russia or Soviet Government. The position of Soviet Russia, on this premise, was the same as if it were the assignee of the Russo-Asiatic account. Thenceforth, National City Bank could treat Soviet Russia as a depositor who had to its credit $2,261,981.72. It necessarily follows that the credit balance became available for set-off against Soviet debts to National City Bank, in those instances in which the equitable doctrine of set-off obtains.

" I turn now to the second member of the set-off equation —The Russian Treasury Notes. Again accepting the premise that retroactive effect must be given to recognition, it must be acknowledged that on November 7, 1917, the date of the revolution, Soviet Russia became the obligor on Russia's Treasury Notes. Another way of saying it is that the State of Russia was the obligor on the Notes before the revolution and that the State of Russia continued as the obligor after the revolution. The régime in power changed. The state, as a continuing personality, persisted. *The Sapphire*, 1871, 11 Wall. 164, 20 L.Ed. 127 ; *Guaranty Trust Co.* v. *U.S.*, 1938, 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 ; 1 Moore, *International Law Digest*, (1906) 334 ; 37 Op. Atty. Gen. 505, 513 (1934). That the Soviet Government so understood its obligations is implicit in the decree of repudiation made on January 21, 1918. There would have been no occasion for repudiation were there no obligation.

" On November 1, 1919, the Notes fell due. They were payable at National City Bank. They were, therefore, the equivalent of orders ' to the bank to pay the same for the account of the principal debtor thereon '. N.Y. Negotiable Instruments Law, McK. Consol. Laws, c. 38, s. 147 ; *U.S.* v. *National City Bank*, 3 Cir., 1936, 83 F. 2d 236, 239, *certiorari* denied 1936, 299 U.S. 563, 57 S.Ct. 25, 81 L.Ed. 414. That order National City Bank could execute unless the act of repudiation prevented it. But if repudiation had such an effect, the set-off should have been disallowed in *U.S.* v. *National City Bank, supra.* The decision in that case is, therefore, precedent—though of moderate weight—that repudiation may not bar the set-off in this case.

" To that decision has been added the force of the distinction

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drawn in *Guaranty Trust Co.* v. *U.S., supra,* 304 U.S. at page 140, 58 S.Ct. at page 792, 82 L.Ed. 1224, ' between the effect of our recognition of a foreign government with respect to its acts *within its own territory* prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals '. (Emphasis added.) The impact of repudiation by a sovereign within its own territory is governed by the law which prevails in that territory. But obligations created here and here performable are governed by local law. *Central Hanover Bank & Trust Co.,* D.C.S.D.N.Y. 1936, 15 F. Supp. 927, affirmed 2 Cir., 84 F. 2d 993, *certiorari* denied 299 U.S. 585, 57 S.Ct. 110, 81 L.Ed. 431. Repudiation by a foreign sovereign of obligations subject to our domestic law is effective only to the extent that its sovereign immunity shields it from suit. Wherever the shield of sovereign immunity is not available there is nothing to prevent our domestic law from taking its course. Here, if the set-off is appropriate, immunity is not available. *Guaranty Trust Co.* v. *U.S., supra,* 304 U.S. at page 134, 58 S.Ct. 785, 82 L.Ed. 1224 ; *U.S.* v. *National City Bank, supra,* 83 F. 2d page 238.

" Nor can the repudiation be regarded as a revocation of the bank's authority to pay the Notes for the account of the obligor. As already indicated, some time after the Soviet Government had repudiated the Treasury Notes, our Government cooperated in securing from the holders an extension of maturity, on request of the then recognized representatives of the Russian State. Relevant is the language of *Guaranty Trust Co.* v. *U.S., supra,* 304 U.S. at page 140, 58 S.Ct. at page 792, 82 L.Ed. 1224 : ' The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are.' Were it held that the repudiation of 1918 must now be considered a part of our municipal law, or that the repudiation is operative as a revocation of the banker's authority, so as to convert these domestic obligations into scraps of paper for all purposes, then the words ' conclusively ' and ' safely ' would have to be stricken from the Court's opinion.

" Does the allowance of this set-off conflict with the national policy as expressed in the Litvinov Assignment ? I think it does not ; or at least no more so than allowing the set-off in *U.S.* v. *National City Bank, supra,* or in giving effect to the Statute of Limitations in *Guaranty Trust Co.* v. *U.S., supra.* The United States took Russia's claims subject to their infirmities. No conflict with national policy is generated by acknowledging and giving effect to an infirmity when it is discovered.

" Historically, it is of course true that National City Bank did not lend Russia the proceeds of the Treasury Notes in reliance upon the security of the Russo-Asiatic account. 3 Story's *Equity Jurisprudence*, 14th Ed., Sec. 1871. Historical reliance in fact is, however, unnecessary to render mutual debts capable of being set-off by a bank. Were it otherwise, deposits put to the credit of an account after the debt was incurred would not be subject to set-off. The law draws no such distinction. New York Negotiable Instruments Law, s. 147 ; *Ætna Nat. Bank* v. *New York Fourth Nat. Bank*, 1871, 46 N.Y. 82, 7 Am. Rep. 314 ; *National Bank of Newburgh* v. *Smith*, 1876, 66 N.Y. 271, 23 Am. Rep. 48.

" It is, of course, painfully clear that to reach the conclusion that the defense should be sustained I have traversed a bridge built of fictions. ' Retroactivity ' of Soviet recognition in 1933 commands us to treat the Russian decrees of 1917 *as if* the United States had recognized the Soviet Government on the day of the revolution. That fiction prevails until it collides with another, that the accredited agents of the Provisional Government must, at least in some respects, be treated *as if* there were a government whom they represented. Despite the cataclysmic character of the Bolshevik revolution, we must treat the Soviet Government as the uninterrupted extension of the empire of the Czars. These fictions, however, are the tools which the courts have forged for shaping the answers to the kind of questions which this case presents.

" Plaintiff stoutly resists the arguments in favor of set-off and appeals to two lines of reasoning, which for convenience may be denominated legal and equitable.

" The legal argument is founded upon Soviet Russia's immunity. In order to raise that shield, it asserts that the Notes and the Russo-Asiatic deposit account did not arise out of the same transaction. If the deposit is the property of Russo-Asiatic and the Notes are the obligation of the Russian State, then the credit and debit do not arise out of the same transaction and one may not be used to pay for the other. But plaintiff itself insists that since December 27, 1917, not Russo-Asiatic but Soviet Russia owned the account. Let us suppose that, absent the banking decrees, on December 27, 1917, Russo-Asiatic had drawn a check on its account in favor of Soviet Russia, and that the latter had then caused it to be deposited in an account in its own name in National City Bank. Would not National City Bank be free to apply such a credit balance to a debt of Soviet Russia payable at National City Bank, whether the holder of the obligation was itself or another ? Would Soviet Russia be heard to say that the credit arose out of another transaction ?

" When a depositor deposits moneys to his account in a bank, the bank may apply them to discharge his obligations, *payable at the bank*, without inquiring whether the deposit consisted of proceeds of a transaction in some way related to

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the debt. Section 147 of N.Y. Negotiable Instruments Law and the antecedent law which it codified, *Ætna National Bank* v. *Fourth National Bank*, 1871, 46 N.Y. 82, 88, 7 Am. Rep. 314, reflect a 'commercial usage' that a note of a depositor payable at his bank may be paid by access to his deposit-account. See *K. & K. Silk Trimming Co.* v. *Garfield National Bank*, N.Y. App. Term, 1926, 127 Misc. 27, 215 N.Y.S. 269.

"To accept plaintiff's argument, one would be compelled to deny that on December 27, 1917, Soviet Russia became the owner of the deposit account at National City Bank theretofore standing in the name of Russo-Asiatic; and such a denial would take the props from under the whole of the Government claim.

"As plaintiff would maintain the separate personality of Russo-Asiatic, but only when expedient to meet the defense advanced by National City Bank, so it would have the Soviet Government treated as quite a distinct sovereign from its predecessor régime. Only on such an hypothesis can it be argued that the Notes were not the debt of Soviet Russia. If, however, we are to give full and retroactive effect to recognition, as plaintiff insists that we must, then we must acknowledge that the Soviet Government represents the same Russian State as the Provisional Government represented, the same corporation sovereign under a new name and style, represented by new agents whose authority our Government, by the act of recognition, has conclusively established.

"At this point plaintiff falls back upon repudiation. Were the Notes governed by Russian law repudiation might be a safe refuge. The Notes, however, were made in Washington, were issued originally to secure funds to pay for American products purchased in the United States, were payable in New York, at National City Bank, in United States currency. Even if full effect be given to the presumption that the obligations of a sovereign are intended to be governed by the law of the sovereign, *Smith* v. *Weguelin*, M.R. 1869, L.R. 8 Eq. 198, 212; *Goodwin* v. *Robarts*, H. of L., 1876, 1 App. Cas. 476, 494; *The Brazilian Loans*, Publications of the Permanent Court of International Justice, Series A. No. 20/21, p. 93, 121; but compare, *Rex* v. *International Trustee* (1937) A.C. 500, 530, it is nevertheless clear to me that the history and form of the Notes amply rebut any such presumption.

"Equally hapless is the argument that repudiation, if not operative as governing law, is at least effective as a revocation of the implied authority annexed to the Notes to pay them out of the obligor's account. That argument fails because, in fact, the extension of the Notes by the recognized representatives of Russia occurred after the decrees of repudiation, and in law, at least as to the Notes acquired before repudiation, because the authority relied on by plaintiff to support revocability holds that revocation by the obligor is ineffective where the bank is itself the owner of the Note. *K. & K. Silk Trimming Co.* v. *Garfield National Bank,* N.Y. App. Term, 1926, 127 Misc. 27, 215 N.Y.S. 269.

" Plaintiff's appeal to equitable consideration is based upon the contention that the United States is engaged in marshalling assets in order to create a pool out of which all American creditors of Russia might satisfy their claims *pro-rata,* whereas defendant, National City Bank, is seeking to secure preferential treatment for its own claims.

" I need not consider this appeal. Whether the President, by virtue of his authority over our international relations, or the Congress could have modified the rights of Russia's American creditors and debtors for the purpose of making an equal or more equitable distribution to all American creditors, is a question I am not called upon to investigate. The short answer is that neither the President nor the Congress did anything of the sort. The United States simply stepped into Russia's shoes. The complaint, as already noted, states a simple claim at law for the balance standing to the credit of a bank depositor. The Government has chosen to have its claim appraised by such a standard.

" Plaintiff argues, in addition, that defendant's conduct has not always been consistent in its reliance upon the Notes as the means of discharging its liability on the deposit account. I do not stop to consider whether some thread of consistency may be discovered. It would be fatuous for the courts to close their eyes to the history of improvisation which has characterized the long period of non-recognition of Russia. ' One cannot read this body of judicial opinions, in the Divisional Court, the Court of Appeal and the House of Lords, in the New York Supreme Court, the Appellate Division, and the Court of Appeals, and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision.' Frankfurter, J. in *U.S.* v. *Pink,* 315 U.S. 203, 235, 62 S.Ct. 552, 564, 86 L.Ed. 796.

" When the problem is so complex as to produce such an effect upon the most sophisticated courts, it would hardly be equitable to expect of the defendant that its conduct should be always precise, exact and consistent. No doubt it reached for the deposit account with as many hands as it could manage. Sufficient it is that at least once its grasp was equal to its reach.

" The question of the amount of the set-off presents no difficulty. National City Bank is the holder of the Treasury Notes in a principal amount sufficient to extinguish the deposit-account. The acquisitions and sales of these Notes by National City Bank have already been narrated, *supra.* Acquisitions subsequent to the first were effected at a price very much below par. I regard these events as irrelevant to the present inquiry. The significant fact is not that National City Bank

Case No. 18 Contd. continuously held a specified number of Notes but that the Notes were payable *at* National City Bank. *U.S.* v. *New York Trust Co.*, D.C., S.D.N.Y. 1946, 75 F. Supp. 583. That fact never changed. It was that provision of the Notes which made them the equivalent of orders to the bank to pay them out of the obligor's account. *U.S.* v. *National City Bank, supra.*

" Since the claim of Soviet Russia is subject to a set-off of defendant's claim against Soviet Russia, which is sufficient to extinguish it, plaintiff, as assignee of Soviet Russia, takes nothing under its complaint."

[Report : 90 F. Supp. 448.]

Recognition of Governments—Effects of *De Facto* and *De Jure* Recognition—State-Owned Property Abroad in Possession of *De Facto* Government—Possession Illegal by Local Law—Whether *De Facto* Government still Entitled to Immunity in Local Courts in Respect of that Property—Attempted Sale of the Property by the *De Jure* Government—Subsequent Recognition *De Jure* of *De Facto* Government—Effect of.

See Case No. 45 (*Civil Air Transport Incorporated* v. *Claire Lee Chennault and Whiting Willauer*, etc.).

E—STATE SUCCESSION

II.—Succession to Obligations

Case No. 19 **State Succession—Succession to Obligations—International Law and Municipal Law—Former Sovereign Party to Litigation Pending on Change of Sovereignty—Position of New Sovereign—The Law of Israel.**

SHIMSHON PALESTINE PORTLAND CEMENT FACTORY LTD. *v.* THE ATTORNEY-GENERAL.

Israel, Supreme Court sitting as the Court of Civil Appeals.
(Dunkelblum, Rabbi Assaf and Agranat JJ.)
April 12, 1950.

THE FACTS.—The Applicant, a Company registered at Tel Aviv, formerly Palestine, now Israel, had brought an action against the Government of Palestine for the return of the sum of 2539 Palestine Pounds customs drawback. On February 17, 1948, the Haifa District Court gave judgment in favour of the Applicant. On March 17, 1948, the Attorney-General of the Government of Palestine entered an appeal against that Judgment. This appeal was not heard. On May 15, 1948, the Mandate for Palestine terminated and the State of Israel came into existence. The present application, before the

Israel Supreme Court, was for an order that the Appeal should proceed between the Attorney-General of the Government of Israel as Appellant and the Applicant as Respondent. Counsel for the Applicant argued that the liability to pay the judgment debt had now passed to the Government of Israel, which came into existence on the termination of the Mandatory régime and thus took the place of the Mandatory Government " which has ceased to exist in the territory of the State of Israel ", that the powers and functions of the Attorney-General of the Government of Palestine had passed to the Attorney-General of the Government of Israel, and therefore that the Attorney-General of the Government of Israel must take the place of the Attorney-General of the Government of Palestine. Alternatively, the Applicant moved the Court to order such person as it thought fit to be joined in the action and to summon him to appeal as Appellant, or, in the alternative, to make an order in the appropriate way for substituted service, so as to enable the Respondent to bring the case to a conclusion. The first motion, for the substitution of the Attorney-General of the Government of Israel for the Attorney-General of the Government of Palestine, was based on the assumption, mentioned in the application, that the judgment debt due from the Government of Palestine had become the responsibility of the Government of Israel. Counsel for the Applicant based this argument on two main grounds :

(1) According to the Law and Administration Ordinance, 5708–1948, the Government of Israel assumed responsibility for the payment of the debts of the Government of Palestine. In his view this derived from Section 15 (A) of the said Ordinance according to which " whenever in any law the word ' Palestine ' appears, the word ' Israel ' shall be substituted ", and from Section 21, according to which the Government of Israel is entitled to collect taxes and other sums due to the Government of Palestine. If the Government collects taxes due to the Government of Palestine then it must also take upon itself its debts. By its behaviour, then, the Government of Israel is estopped from denying that it is the successor of the Government of Palestine and must therefore assume responsibility for the discharge of that Government's obligations.

(2) According to international law the debts of the former Government have passed to the Government of Israel.

Held : that the action must fail. There was no substitution of the Government of Israel for the Government of Palestine. The action should be removed from the list of pending cases without prejudice and with liability to apply. The Court said (*per* Judge Dunkelblum) :

" In my opinion there is no reason for giving to section 15 (A) of the Law and Administration Ordinance the interpretation which has been suggested on behalf of the Applicant.

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Section 15 speaks only about the interpretation of laws, and lays down that, whenever in any law the word 'Palestine' appears, the word 'Israel' is to be substituted. That Section does not deal at all with the interpretation of Judgments. Neither does Section 21 of the said Ordinance assist the applicant in any way. That Section deals with the collection of taxes and other sums due to the Government of Palestine, and not with the discharge of its debts. It is possible, indeed, to derive from this Section precisely the opposite of what the applicant argues. Since the State of Israel is not the successor of the former Government, there was need for specific legislation to entitle the Government to collect taxes and other sums due to the Government of Palestine. Were the Government of Israel the successor of the former Government there would be no need for such legislation.

" But it is enough if we say that so far-reaching an interpretation as that suggested by the Applicant cannot be deduced by a mere process of interpreting the Statute : it should be a specific provision of the Statute. If the legislature had been desirous of imposing upon Israel responsibility for the debts of the Government of Palestine, it would have said this explicitly and unequivocably.

" In the second place, the applicant relies upon international law. In this connexion two questions arise. The first is : In the absence of recognition by the proper authorities of the State of given rules of international law, are the municipal courts of that State entitled to reach a decision on the basis of those rules? The second is: Is there any rule of international law which entitles the applicant to demand from the State of Israel payment of the debt the subject matter of the case before us ?

" Regarding the first question, the matter has been developed in a number of decisions rendered by the superior courts of England, and those decisions are a useful indication to us, having regard to Article 46 of the Palestine Order-in-Council of 1922 [under which, within certain limitations, the general principles of English common law and equity are applied if there are no relevant Palestinian provisions] and Section 11 of the Law and Administration Ordinance, 5708–1948 [according to which the law which was in force in Palestine on May 14, 1948, would remain in force in Israel to the extent that it was not inconsistent with that Ordinance itself or with other enactments made by or under the authority of the Israeli legislature and with the modifications resulting from the establishment of the State of Israel and its authorities]. One of the first of these judgments was that given by the Privy Council in the case of *Cook* v. *Sprigg* [1899] A.C. 572. In that case it was held that a plaintiff in a municipal court cannot rely upon international law and that a municipal court does not exist to ensure observance of obligations imposed upon a sovereign government by the principles of international law. This rule was followed in one of the most important cases dealing with this question, though to a more limited extent: *West Rand Central Gold Mining Company* v. *The King* [1905] 2 K.B. 391. The rule expressed in that case can be summarised as follows: whatever has received the common assent of our country, and that to which we have assented along with other nations in general, may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasions arise for those tribunals to decide questions to which doctrines of International Law may be relevant.

" It follows, then, that in order to prove a rule of international law, sufficient evidence must be brought to show that the State in question has recognized it and acts according to it, so that the character of the rule in question or the fact that the rule is recognized by so many other States, leads to the conclusion that no civilized State can ignore it. The opinion of jurists, it is said in that judgment, even the most learned and most famous, are not sufficient in themselves unless they have been explicitly authorized by an international agreement or have otherwise been transformed into a part of international law by the fact that they have been repeatedly acted upon in negotiations between various States. The principles and dicta from this case were quoted with approval by the Court of Appeal of England in *Commercial and Estates Company of Egypt* v. *Board of Trade* [1925] 1 K.B. 271 at p. 283; A.D. 1923–4, Case No. 228. The question to what extent municipal courts will adjudicate according to the rules of international law also arose in the case of *The Cristina* [1938] A.C. 485; A.D. 1938–40, Case No. 86. There, Lord MacMillan said: ' It is manifestly of the highest importance that the Courts of this country [England], before they give the force of law to any doctrine of international law, should be satisfied that it has the hallmarks of general assent and reciprocity.'

" The Applicant is a Company which was registered in Palestine and its registered office is at Tel Aviv. No evidence was brought as to its composition, that is to say as to the distribution of its shares. It seems to me, therefore, that in this case the essential elements which would justify the application of international law are lacking. If the Company is an Israeli Company, can its relations with the Government of Israel be regulated by the principles of international law? Does international law really have to do with relations such as these?

" It is enough to say here that, with regard to this question, there are opinions to the effect that relations such as these are entirely outside the scope of international law. See as to this Kelsen's article, *Théorie générale du droit international public, problèmes choisis,* in vol. 42 of the *Recueil des cours* of the

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Hague Academy of International Law, p. 117, particularly from pp. 312 onwards, where the following passages occur :

> 'In so far as concerns debts due to individuals who have become, as a result of territorial changes, citizens of the successor State, here there can arise no question of a legal succession based upon principles of general international law itself. The relations between the State and its citizens are in the exclusive jurisdiction of the State in question which can therefore, acting in full accord with international law, decide quite freely whether it will take upon itself debts such as these' (p. 329).

And again,

> 'It can no longer be alleged from the point of view of general international law that the successor is under any obligation to pay to its own citizens contract debts originally created by its predecessor, because relations such as these between a State and its citizens are not a proper matter to be dealt with by international law' (p. 332).

"Thus we see that there exists a doubt whether it is possible, in the case before us, to rely at all on international law in the absence of anything international (such as an international agreement or foreign nationality, etc.) about the relations existing between the applicant and the State of Israel.

"It is indeed true that there are writers who are inclined to deal with questions similar to that before us from the point of view of international law, but it is possible to point out that, even in their views, there exists no clear and generally accepted rule of law to support the Applicant's allegation that the State of Israel is obliged to discharge the debt due to the Applicant from the Government of Palestine.

"The above quoted judgment in the *West Rand* Case is important also with regard to the substance of the matter before us. In that case there arose a problem similar to that before us to-day, namely : was the Government of the United Kingdom responsible for the payment of the debts of the South African Republic which it had overcome by conquest ? Counsel for the plaintiff in that case argued that all the contractual liabilities of the vanquished State which had been entered into before the outbreak of the war, passed after conquest to the victor State, regardless of the precise characteristics of the obligation or its origin."

The Judge then proceeded to summarize the facts and arguments in the *West Rand* Case and reached the conclusion that in the present case the legal difficulties were even greater. He went on :

"Is the State of Israel responsible for the payment of all the debts of the former Mandatory Government, even those which had been incurred during its struggle against the aspirations of the Jewish people, aspirations which were to bring about the establishment of the State of Israel? Is the State of Israel responsible for the discharge of debts due to former residents of Palestine who are not today residents of Israel? The territory of the State of Israel does not coincide with all the territory under the former Mandate. What, then, should be the relative proportion of the obligations of the Mandatory Government which fall upon the State of Israel? Clearly it is not the task, nor is it within the capabilities, of a Court of Law to give a reply to these questions.

" In fact no authorities of international law were quoted in support of the Applicant's argument that the Government of Israel is responsible for the former Mandatory Government's debt, the object of this judgment. The text-books on international law distinguish between different classes of rights and liabilities and different rules apply to these different classes. But regarding the question before us there is no need to mention those rules which have no direct connexion with the subject matter of this judgment. We are concerned with a demand for the payment of a debt and it will be sufficient if I say that there does not exist in international law any generally accepted rule imposing liability on the State of Israel to discharge this debt. In support of this I will refer to several authorities to demonstrate the differences of opinion existing on this question, to make it clear that there is no justification for holding that the argument put forward on behalf of the Applicant is an accepted principle of international law.

" The territory of the State of Israel, as has already been mentioned, does not coincide with all the territory under the former Mandate. Consequently the problem before us is not dissimilar to the problem which arose following the break-up of the Austro-Hungarian Empire after the First World War. This question is dealt with on p. 160 of vol. 1 of Oppenheim's *International Law* (7th edition). There it is stated that it would be only just in such circumstances if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of international law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.

" After the dissolution of the Austro-Hungarian monarchy the question was discussed by several law courts in the successor States. Perusal of the volumes of the *Annual Digest of Public International Law Cases* for the years 1925–6, 1927–8 and 1929–30 shows that, on this question, the majority of the Courts decided that there is no succession in regard to such debts except where the Peace Treaties provided otherwise. It is interesting to point out that in one case, the *Succession in Obligations* (*Fees Paid in Error*) *Case* (A.D. 1925–6, Case No. 50),

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the Supreme Administrative Court of Czechoslovakia gave judgment against the Republic of Czechoslovakia in a case about the payment of a debt due in circumstances similar to those before us. However, the Czechoslovak legislature found it necessary to change the situation brought about by that judgment, and it cancelled the liability of the Czechoslovakian Government in such circumstances. See *Annual Digest*, 1927–1928, Case No. 58, and Notes thereto. See also Oppenheim, *loc. cit.* p. 160, footnote 2.

" Regarding the above question it is also valuable to recall the arbitral award rendered by Borel in the *Affair of the Ottoman Public Debt.* In that arbitration, to which the Government of Palestine was a party, it was argued that there exists no principle of international law requiring States, acquiring portions of territory from another State, to pay any relative proportion of the international debt of the former State. The arbitrator agreed with that contention : see 1 *Reports of International Arbitral Awards*, p. 529 ; *Annual Digest*, 1925–6, Case No. 57. Kelsen also, in the above quoted article, after analysing various points of view, states :

> ' Whatever the debt it should be observed that the rules of general international law regulating succession nowhere impose upon the successor State an obligation to pay creditors who are or became its nationals or who remain its nationals or who remain nationals of its predecessor. For the rest, it is not possible to affirm that, in so far as concerns the creditors who are nationals of third States, the successor State is in all circumstances under an international obligation towards such third States to pay those of its citizens who are creditors in respect of contract debts undertaken by its predecessor ' (*loc. cit.* p. 346).

" It is my opinion, therefore, that there is no justification for the view that there exists, in international law, any rule which commands general assent and which is thus part of the municipal law of the country, imposing upon the State of Israel responsibility for the discharge of the debt the subject matter of this judgment and I therefore hold that the application for the order that the Appeal should proceed between the Attorney-General of the Government of Israel as Appellant and the Applicant as Respondent is not well founded. There is also no ground for the Applicant's alternative request and there is no need to dwell upon it at length. It is inherently unsound. On the one hand the Applicant argues that the Government of Palestine has ceased to exist, and on the other hand it moves this Court to appoint a person to accept service in place of the former Government. In argument, Counsel for the Applicant mentioned the Crown Agents who, in his view, should take the place of the original Appellant and who should therefore be summoned in the Appeal, but no authority in support of this was brought, nor is there any evidence to show the existence of any connexion between the Crown Agents and the Government of Palestine so as to enable the Court to fix responsibility on the Crown Agents in regard to the claim. Had there been any substance in this argument, it would have been necessary to consider another question, namely: are the Crown Agents a Department of the British Government so that this Court cannot assume jurisdiction to deal with a claim against them, owing to the well-known rule of State immunity? However, having regard to what I have said above, there is no need to go into this question. Counsel for the Applicant also asked for appropriate relief so as to bring the Appeal to an end. This request can be well understood. The Applicant obtained a judgment in his favour from a competent court. An Appeal was submitted in the name of a Government which has since ceased to exist and there is, therefore, no possibility of hearing it. The Civil Procedure Rules do not contain any provision regarding the cancellation of an Appeal or its striking from the list for want of prosecution. According to the Rules, there is no possibility of making an order against the Appellant unless he is duly summoned to a judicial hearing. However, the circumstances of this Appeal are unique and the legislator could not have foreseen them. In my opinion, therefore, it would be meet, even in the absence of an appropriate rule of procedure, to strike the Appeal from the list of pending cases before this Court without prejudice, so that this Court shall have the right to return the Appeal to the list if it should be so moved on the part of any person establishing his right to come in the place of the Appellant."

[Reports: *Piskei-Din*, vol. 4 (1950), p. 143; *Pesakim Elyonim*, vol. 9 (1951), p. 16.]

NOTE.—The principles enumerated by the Court in the above case were followed in other circumstances. In *Pales* v. *Ministry of Transport*, decided by the Haifa District Court on January 1, 1952, the case concerned a contract for the installation of bookstall kiosks on railway stations, entered into on June 17, 1938. This contract had been in force almost up to the end of the Mandate. The last rent to the Mandatory authorities had been paid in January 1948, for the first quarter of that year. In the beginning of March 1948 the Director General of the Palestine Railways informed the Plaintiff that, while he had no wish to interfere with the subsistence of the contract, the terms of the contract could not be regarded as binding any successor to the Palestine Railways after May 15, 1948. In September 1948 the Israel Railways invited tenders for bookstall kiosks. The Plaintiff submitted a tender under protest, reserving all its rights under its contract. The Plaintiff subsequently brought an action seeking a declaration that it was a statutory tenant holding under the terms of the earlier contract. In dismissing the application, the Court said, *inter alia*: " Does a lease made by the

Case No. 19 ***Contd.***

Mandatory Authorities and relating to property of the railway administration or to any other public property, also bind Israel, which came into possession of that property ? . . . The State of Israel is not a successor of the Mandatory authorities in the sense of transfer of rights by agreement or by law." The Court quoted the *Shimshon* case, and proceeded as follows :

" Israel has not inherited the property of the Mandatory Government but took possession of it by virtue of her sovereignty after the establishment of the State. This appears clearly in section 2 of the State Property Law, 1951, which declares that the property of the Mandatory authorities found in Israel is the property of the State of Israel, as from May 15, 1948, and section 1 of the same law defines ' property of the Mandatory authorities ' as including also property of Government departments and services, that is to say, also property of the Railway Administration. Since this property was not transferred from its former owner to Israel, we cannot apply the rules of Civil Law according to which transfer of ownership does not cancel existing contracts. The State Property Law is silent as to whether State property is subject to hirings, rights, and other encumbrances subsisting over them during the period of the Mandate. I think that we have to seek the answer to our problem from international law. In the *Shimshon* case the Supreme Court cited a number of English precedents to the effect that a State's municipal courts will recognize the rules of international law and decide according to them only to the extent that other civilized States have agreed to those rules, so that it may be assumed that those rules have also been accepted by that particular State. A municipal Court will not use a rule of international law unless it is satisfied that the rule enjoys general support. The question whether there is a generally recognized rule to the effect that contracts made before the establishment of a State, and in relation to property which becomes property of that State, are binding on that State, has not been fully argued. Oppenheim, vol. 1, § 82, speaking of contracts in general and concessionary contracts in particular, answers the question in the negative, but Schwarzenberger, *International Law*, 2nd ed., vol. 1, page 83, suggests answering in the affirmative, relying on the decision of the Permanent Court of International Justice in the *German Settlers in Poland* case, A.D., 1923–4, Case No. 37. The learned author leaves open the question whether a State is entitled explicitly and by municipal legislation to cancel private rights acquired before its establishment. This question does not concern us here, since Israel has enacted no such law. Counsel for the Plaintiff also referred to the Anglo-Israeli Agreement of 30 March 1950 for the settlement of financial matters outstanding as a result of the termination of the Mandate. [*Israel Treaty Series* No. 15, *U.K. Treaty Series*, No. 26 of 1950.] According to Article 8 thereof, ' save as herein provided, the Government of Israel shall make no claim to any property of the Mandatory Government outside Israel, and the Government of the United Kingdom shall make no claim to any property of the Mandatory Government in Israel '. The parties to that agreement did not pretend to establish the legal situation of property of the Palestine Government except in so far as the Agreement lays down ; and the

Agreement is essentially one relating to financial matters and certain property of the *British* Government situated in Israel."

[Report: *Pesakim Mehoziim*, vol. 7 (1953), p. 167.]

State Succession—Succession to Obligations—Unliquidated Damages—Continuity of States.

See Case No. 11 (*Schäcke and Another* v. *Republic of Austria*).

V.—Respect for Private Rights

State Succession—Effect on Private Rights—Cession—Rectification of Frontiers between Holland and Germany after the Second World War—Effect on Private Contracts. **Case No. 20**

RADERMACHER *v.* X.

Holland, Cantonal Court at Nijmegen (Chamber for Rents).
January 28, 1950.

THE FACTS.—Before the award[1] to Holland in 1949 of a stretch of adjacent German territory, Radermacher, a Dutch farmer of Beek (Holland), had rented from a landowner, X, also a Dutch subject, some pastureland situated at Zyfflich (Germany) and registered in the German *Grundbuch* (Land Registry) of Wyler, for a term of two years from January 1, 1948. On December 2, 1949, Radermacher applied to the Rent Chamber of the Cantonal Court at Nijmegen for a renewal of the lease on the basis of a Netherlands Decree on Land Leases enacted in 1941 in occupied Holland on the authority of the German Occupation Authorities and provisionally maintained in force after the liberation of the national territory by Royal Emergency Decree No. E 93 of 1944, enacted from London. In the meantime the effects on civil rights of the annexation of the German boundary strip had been regulated by a Royal Decree of April 22, 1949 (*Official Journal*, No. J 181).

Held: that the application must fail. The property in question was located in the Kingdom of the Netherlands at the time when the application was made, and therefore Dutch law applied. Under that law only long leases were susceptible of extension: hence the short lease, the subject of the present application, could not be extended.

[Report: *N.J.*, 1950, No. 528.]

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[1] By a Protocol of March 22, 1949, adopted by the Commission for the Western Frontiers of Germany (United Kingdom, United States of America, Belgium, France, Luxemburg and the Netherlands). See Netherlands Act of April 21, 1949 (*Staatsblad*, No. J 180) and Royal Decree of April 22, 1949 (*ibid.*, No. J 181), repealed and re-enacted by the Act (*Grenscorrectiewet*) of September 26, 1951 (*ibid.*, No. 434).

Case No. 20 *Contd.* NOTE.—Cf. also the case of *X.* v. *Jurrissen et Al.*, decided by the District Court of Maastricht on April 13, 1950 (*N.J.*, 1951, No. 280). This was an action against three Germans for taking a horse and a cow in a village within the strip of German territory which was subsequently annexed to the Kingdom of the Netherlands. It was *held* that the defendants were liable for damages calculated in accordance with German law. In matters of tort the applicable law was that of the State in which the tort was committed. Although after the frontier changes the *locus delicti* had become Netherlands territory, under Article 10 of the Netherlands Decree on Frontier Correction (*Official Journal*, No. J 181) the introduction of Dutch law in the territory annexed did not affect civil rights acquired under formerly prevailing law.

VII.—International Conventions

Case No. 21 **State Succession—Treaties—Effect of a Colony Gaining Independent Sovereign Status—Conclusiveness of a Statement by the Executive on Succession to Treaty Rights—Requirement of Incorporation of Treaty Rights in Municipal Law—Extradition—Conditions of—The Law of Singapore.**

Re WESTERLING.

Singapore, High Court, Original Criminal Jurisdiction.

(Evans J.)

August 15, 1950.

THE FACTS.—The Government of the Republic of the United States of Indonesia requested the extradition of Westerling, who was accused of the commission of certain crimes in Java while on his way to Malaya. Proceedings were commenced before the District Judge and First Magistrate, Singapore. Westerling applied to the High Court for an Order of Prohibition, to prevent any further hearing by the First Magistrate of the extradition proceedings then before him. The applicant claimed that the District Judge had no jurisdiction in the matter, as no extradition treaty existed between His Majesty's Government and the Government of the United States of Indonesia, and that the rights and benefits provided for by the Extradition Acts, 1870 to 1906, were, therefore, not available to the Government of the Republic. Alternatively, it was submitted that even if an extradition treaty existed between the respective Governments the rights, benefits and duties provided for by that treaty would not have become part of the municipal law of England or of the Colony because the Extradition Act, 1870 (which applies to the Colony and on this point was the sole relevant Act), had provided impliedly that the only Governments entitled to proceed under the Act (or subsequent related Acts) were Governments of States to which the Acts had been applied by Order-in-Council, and no Order-in-Council had been made applying the Extradition Acts to the Republic of the United States of Indonesia.

Counsel for the Government of the Republic of Indonesia argued that the Republic had succeeded to the rights of the Netherlands Government under the Anglo-Netherlands Extradition Treaty of 1898, and the related Order-in-Council of February 2, 1899, in respect of Indonesia.

The Attorney-General entered an appearance and made a statement on the authority of the Secretary of State for Foreign Affairs that Indonesia had succeeded to the rights of the Netherlands under the Treaty. He claimed that such a statement was binding on the Court.

Held : that the application must be granted. The Courts of the Colony had no jurisdiction to surrender the accused. Although an Extradition Treaty existed between His Majesty's Government and the Government of the Republic of Indonesia, as evidenced by the statement of the Attorney-General, no Order-in-Council existed which incorporated the Treaty into the municipal law.

I. *Requirements of Extradition. Necessity for a Treaty. The Extradition Acts.*—The Court said : " The ground was argued in two ways arising from the scheme of the Extradition Acts 1870–1932, of which Acts, however, that of 1870 alone is relevant. That Act does not deal with a purely internal matter or one which can be regulated by municipal law alone. Extradition imports two states, one requiring extradition and one from which the surrender of an alleged offender is required. It also touches on the liberties of the alleged offender. The Act, though it may be capable of general application, of itself may be said to apply to nothing. Before it can be made to apply, there must be states agreeing to mutual extradition. The Act, therefore, contemplates a treaty, or arrangement, entered into with another state desiring to establish a system of extradition, and it accordingly goes on to authorise His Majesty in Council to make an Order, reciting or embodying the treaty, and applying the Acts in the case of that state which is the other party thereto. Any act taken by officers of state, or by others, for the purposes of extradition against an individual must be under or in accordance with the Statute so applied.

" The applicant alleged that there was neither treaty, nor Order-in-Council with the United States of Indonesia, the requisitioning state in this case, under or in respect of which any action could be taken under the Statute. It is not disputed that there is no specific treaty entered into with the United States of Indonesia for this purpose, and, consequently, there is no Order-in-Council applying the Acts to that country in

Case No. 21 *Contd.*

regard to that treaty. The argument on the first point was partly in anticipation of possible cases to be made, and partly in reply to a statement . . . that the United States of Indonesia is a ' successor ' of the Netherlands. The argument was necessarily nebulous, as there were several points, such as the date, and mode, of His Majesty's recognition of the United States of Indonesia, and whether His Majesty's Government had consented to any devolution of rights which might be affected by Article 5 of the Draft Agreement on Transitional Measures made at the Round Table Conference at the Hague on 2nd November, 1949, on which it was suggested, the Court would have to seek information in some way or another. At an early stage I raised the question of how far these matters could be tried by this Court, since the view of His Majesty's Government would seem to be clearly inferable from the action already taken, and of how far they were relevant to the matter before it."

II. *Conclusiveness of Statements by the Executive on Questions of International Law. Succession to Treaty Rights.*—The Judge continued : " Counsel, however, contended (and rightly) that, if there was no treaty, the Acts could not be invoked, and the matter should be determined beyond doubt. He argued that the United States of Indonesia was a new, and sovereign state, and that whatever the Netherlands might have done to give it ' succession ' to itself, the acts of these two states could not affect a third.

" I do not propose to set out, or to consider, these arguments at length, as in my opinion, they are completely answered by the contentions put forward by the Attorney-General, and by the statement read, or put in, by him as a certificate of the view of His Majesty. This statement is to the following effect :

> ' I have to inform the Court on the authority of the Secretary of State for Foreign Affairs that the Republic of the United States of Indonesia has succeeded to the rights and obligations of the Kingdom of the Netherlands under the Anglo-Netherlands Extradition Treaty of 1898 in respect of Indonesia and the said Treaty now applies between His Majesty's Government in the United Kingdom and the Republic of the United States of Indonesia.'

" The Attorney-General contended that the question of whether the Crown is in treaty relations with a foreign state is a matter on which the Court should seek guidance from the appropriate department of the Executive, and whatever may be certified as His Majesty's view of the matter in the reply is, not merely evidence of the fact, but is conclusive evidence. The views of His Majesty may be ascertained not only in reply to specific enquiries by the Court, and, in any matter in which the King's Attorney-General appears and makes a statement of those views, such statement is equally conclusive. The

Court is so bound by the views of His Majesty on all matters affecting the Crown's relations with foreign states and on all questions of international law.

" In support of the first proposition he cited numerous dicta in *Duff Development Company* v. *Government of Kelantan*[1] ((1924) A.C. 797), *Mighell* v. *Sultan of Johore* ((1894) 1 Q.B. 149) and in other cases to which it is unnecessary for me to refer. The point is one which was recently debated, and contested, at length in these Courts in *Sultan of Johore* v. *Tungku Abubakar and Others* ((1950), 16 M.L.J. 3) and in that case (pp. 22–26) I expressed an opinion which was entirely in accordance with the view put forward by the Attorney-General, and from which I see no reason to retract. On his second proposition he referred to *Engelke* v. *Musmann*[2] ((1928) A.C. 433), and *The Gagara*[3] ((1919) P. 95), and other cases. While the Courts have in some cases referred to an established procedure of reference by the Court, as Lord Cave in the *Duff Development Case* (p. 805) spoke of the established practice of the Courts seeking information in this way when any question of the sovereignty of a foreign state is raised ; yet this does not imply that no other procedure is open, or that one mode of procedure is peculiarly applicable to a specific subject of enquiry. In *Luther* v. *Sagor*[4] ((1921) 1 K.B. 456), Roche J. himself caused enquiries to be so made, although letters from the Foreign Office had been obtained by the parties and were before him, but he did so, not to comply with any practice, but in case ampler or fuller information might then be available. There can be no doubt that a concurrent practice of accepting in the same sense information conveyed to the Court by the Law Officers existed and was in fact followed in *The Parlement Belge* ((1879), 4 P.D. 129 & (1880), 5 P.D. 197), which is perhaps the most important case on these matters, and in which the question raised as to the international convention and as to the possession of the vessel by a reigning sovereign were accepted on the Attorney-General's pleading, and this is a question closely analogous to that referred to by Lord Cave. It seems that there is no prescribed form of proof, but the Court is bound by any intimation of His Majesty's view by whatever channel he pleases to communicate it.

" Sir Roland Braddell (for the Republic of the United States of Indonesia) in dealing with the same matter spoke of foreign affairs as the subject of such enquiry and conclusive evidence. He went on to discuss acts of state which could not be questioned by legal process as giving rise to no right of action in tort or contract. He did not, as I understood him, contend

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[1] See *Annual Digest*, 1923–1924, Case No. 65, p. 124.
[2] *Ibid.*, 1927–1928, Case No. 245, p. 362.
[3] *Ibid.*, 1919–1922, Case No. 25, p. 45.
[4] *Ibid.*, 1919–1922, Case No. 26, p. 47.

Case No. 21 ***Contd.***

that such a plea could defeat a subject, in respect, at least, of an act in this country, or that the applicant, being an alien, his arrest might be so excused. He went on to consider the King's treaty-making powers and spoke of their making as acts of state. He admitted that such treaties could not alter the law, but urged that the Government making them, would probably be in a position to obtain any necessary change of the law from Parliament. No question, however, of His Majesty's power to make treaties, has been raised, the only question is whether the necessary treaty has, in this case, been made—or more generally whether such treaty relations exist.

" The Attorney-General's third proposition goes further than Sir Roland's arguments. It is thought necessary in order to cover the statement that the Republic has succeeded to the rights and obligations of the Kingdom of the Netherlands under the Treaty of 1898. This might be regarded as a conclusion drawn from the application of rules of international law, and the application of rules of law might be thought a function of the Courts. He rested this proposition on *Foster* v. *Globe Venture Syndicate* ((1900), 1 Ch. 811), and *The Zamora* ((1916) 2 A.C. 77). I do not think these cases give his proposition much support. The subject of inquiry in the first was whether a boundary exists in fact, without, it would seem to me, any reference to ownership, as the Attorney-General suggests, or to the legal title at any law to land on either side thereof. It might be a boundary of sovereignty, and not of ownership, nor of legal possession. The second case seems rather against him. The question turns on what is here meant by international law. Counsel for the applicant had referred to the definition of Lord Russell of Killowen adopted by Lord Alverstone in *West Rand Central Gold Mining Company Ltd.* v. *The King* ((1905) 2 K.B. 391 at p. 407), ' it is the sum of the rules or usages which civilised states have agreed shall be binding upon them in their dealings with one another '. From which and from a general view, it might be thought that, apart from express agreement, it is not a law having moral authority, or as embodying ethical principles commanding obedience, but mere historical generalizations from conduct. It would, in a fuller investigation, be necessary to enquire how far ' rules ' are anything more than deductions from repeated acts, or from usual conduct. As to such rules and as to usage, the generality of the conduct would be immaterial as the Courts would be bound to accept His Majesty's views of such acts, and, in general, the acts of His Majesty's Government. On this view there would, therefore, be little difference between the first proposition and the third. On the other hand the proposition in its full extent seems directly contrary to the principal point in *The Zamora Case* [1] cited, which I should have understood to be the Privy Council's rejection of Lord Stowell's dictum in *The Fox* ((1811), 1 Edw. 311), that Orders-in-Council in the Prize Court are analogous to Statutes in the Common Law Courts, and of the apparent opinion that the Crown could legislate by Order-in-Council, and its acceptance of his other opinion in *The Maria* ((1799), 1 C. Rob. 340), that the Prize Court is a Court applying international law, though there are passages suggesting that the Privy Council's opinion is confined to cases in which the Crown is a party. The contrary proposition was Lord Robert Cecil's second proposition in *West Rand Gold Mining Company Ltd.* v. *The King*[1] which there received but very partial acceptance. The proposition may be too wide, but it might be accepted for the purposes of this case, for if the Court be bound by the Crown's recognition of the Republic, it must also accept what the Republic is recognised as ; only such full acceptance would seem to me consistent with the full meaning of the majority opinions in the *Duff Development Case*.[1] I think that all the matters set out in the statement quoted must be accepted and are conclusively established.

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[1] See above.

" The Attorney-General went on to argue on an assumption that the statement was not accepted as conclusive. It would be unnecessary to follow those arguments, and his examples of succession, were it not that they throw some light on the application of the Acts, and introduce some illuminating cases not, in my opinion, very helpful to his case. It is not, nor could it be disputed, that the Extradition Acts were applied to what are now the territories of the Republic, and in particular, to Java. The Attorney-General referred to sections 2, 5 and 25 of the Act of 1870. There can be no doubt that under these sections the Acts were applied to Java, but they were not applied to Java as such but only as being a colony of the Netherlands. Had it not been a colony the provisions would not have operated. The Attorney-General argued that the Acts were applied to those territories, and continued to apply. The Act does not speak of territories, it speaks consistently of ' states ' by which I can only understand sovereign states including therein such areas as section 25 requires.

" In this connection he referred among other instances to some furnished by the dissolution of the Austro-Hungarian Empire. A treaty was made on 3rd December, 1873, with the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary and an Order-in-Council applying the Acts was made on 17th March, 1874. After the 1914–18 war notices were given to Austria and Hungary reviving this treaty. We have no clear information as to these notices, but they are understood to be designed to prevent, or remedy, any abrogation affected by war. In the same way a treaty was made with

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[1] See above.

Case No. 21 *Contd.*

Serbia on 6th December, 1900, which continued with Yugoslavia. Later Orders-in-Council, including No. 971 of 30th July, 1923, recited such treaty as still existing. The Attorney-General referred to several examples. The Attorney-General was arguing, on the assumption that Austria after the war was a different person at international law from the party to the treaty, that a treaty made with one party might continue with another, and submitted that a recital in an Order-in-Council, relying on a dictum in *The Zamora* [1] at p. 98, is binding on the Court.

" I am unaware of any authority for the view that there is a breach in the historical continuity of the Austrian or Hungarian State ; changes of constitution, of name, or of area, are of varying importance and would not necessarily change the personality of a state. To me the cases would seem to imply the opposite, and the only apparently relevant case among the successors to the Austro-Hungarian Empire, would have seemed to be Czechoslovakia. On that case we have no more certain guidance than that in Sir Arnold McNair's book *Law of Treaties* at p. 453 where he says that he believes that in the view of the British Government Czechoslovakia, despite reference in a Treaty of 1919 with the Allies to the Kingdom of Bohemia, Markgraviate of Moravia and Duchy of Silesia, is no successor to the Austro-Hungarian Empire, but he gives no reason for that belief ; and also that guidance afforded by the making of a new treaty and a new Order-in-Council with Czechoslovakia on 11th November, 1924, and on 20th November, 1926.

" It might seem hard to draw such distinction between the Republic and Czechoslovakia as to rights of succession. The latter had been in the nature of an ally in the preceding war, and was named in a form as King of Bohemia, etc., in the treaty in question. The treaty applied to the Republic merely as a colony. It remains in some treaty relations with the Netherlands, called a Union, but is a separate sovereign state. The case would seem to show three possibilities : a continuing state, a ' successor ' contemporaneous with its predecessor and a new state which is not a successor. The Austrian cases on this point may not therefore be strictly apposite, but on the other hand, the question of succession being concluded, they may yet provide some analogy as to this theory of the continuing territorial application of the Act.

" My conclusions from all this are the opposite to those of the Attorney-General. It would seem to me that, in the case of Austria and Hungary, the same treaty and Order continued, although originally made jointly with a dual monarchy, and despite the reduction in size ; while, in the case of Serbia, the same state under the same king was recognised as continuing in Yugoslavia. In Czechoslovakia where a new state arose a new treaty and a new Order were made, although had that state merely been recognised as a 'successor' all that would have seemed needed, according to the Attorney-General's case, would have been a notice similar to those given to Austria and Hungary. Taking the territory of the Empire, before the war the Acts were applied in respect of all in accordance with the Imperial Treaty. There was, however, no continuing application to territory, except where there was continuing state personality, but in Czechoslovakia where the Acts had presumably ceased to apply new provisions had to be made, while in those parts absorbed by Serbia an old, and, in a sense, competing, treaty and Order took the place of the Imperial Treaty and its corresponding Order. In my opinion, application depends on the existence of an appropriate treaty and an appropriate Order-in-Council. The statement affirms such treaty.

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[1] See above.

"From this statement it would also appear that there may be at international law some one, unknown, I believe, to other law, in the nature of a *haeres viventis*. It may not be for this Court to discuss his qualities, but such a successor must, it would seem, be a still more separate and distinct person than the more usual person claiming by succession, for he is contemporaneously existent with his predecessor. The word succession otherwise suggests an analogy to natural persons. It is by no means unusual for a successor to be determined by a person's personal law, or the law of his domicile, but a construction of a grant to the predecessor, or of his contracts, would be governed by the law of the land. The fact that a successor may be determined elsewhere by international law presents no great difficulty."

III. *Treaties. Requirement of Incorporation in Municipal Law.*—"None of the parties had much to say as to the Order-in-Council, though it appears a matter of the first practical importance. The only Order-in-Council on which the Republic could rely is that of 2nd February, 1899, corresponding with the treaty referred to in the statement. Mr. Massey drew attention to the Order-in-Council and to the operative penultimate paragraph which applies the Acts to the State of the Netherlands only, for it reads: 'Now, therefore, Her Majesty, by and with the advice of Her Privy Council, and in virtue of the authority committed to Her by the said recited Acts, doth order, and it is hereby ordered, that from and after the fourteenth day of March, 1899, the said Acts shall apply in the case of the Netherlands, and of the said Treaty with the Queen of the Netherlands.' Sir Roland Braddell seemed unwilling to refer to the Order-in-Council except in answer to questions. He contended, as I understood him, that the treaty was the most important, and only really operative, instrument; and he repeatedly referred to that part of section

Case No. 21 Contd.

2 of the Act of 1870 which provides: 'Every such Order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.'

"It may be conceded that the treaty is the most important instrument, without which the Act would be a dead letter, and no Order-in-Council called for. Nevertheless, by itself, it effects nothing practical, and on it no man under the protection of the law could be arrested, and against him no proceeding could be brought. The powers to extradite all flow from the Act, and until the Act is applied the treaty remains in the clouds, or, at least, its existence and force are confined to the realms of international law. To look at the matter from a practical point of view; proceedings can only be instituted through sections 6 & 7. If requisition be made, the question at once arises whether requisition be made by a state to which the Act has been applied, and, to determine this, recourse must be had for the reasons stated, not to the treaty, but to the Order-in-Council. It must be read to be understood, and it must be construed to understand its full meaning.

"This Order-in-Council is an ordinary instrument of subordinate legislation, it is to be construed by this Court, and in accordance with the ordinary canons of legal construction. So read I should have thought its meaning beyond doubt. The state in the case of which the Act is applied thereby is the Netherlands and no other. It is not in the case of the Republic of Indonesia, nor in that of the Netherlands and its successors, contemporaneous or by substitution. The Order-in-Council, just as that in the case of Austria, is still capable of application. The Court might be obliged to construe the treaty as part of the Order-in-Council, but, for this purpose, it does not seem necessary to go beyond the penultimate paragraph. It is a principal canon of interpretation, which has been called the golden rule, that the grammatical and ordinary sense of the words is to be adhered to and by this means the intention of the maker or lawgiver must be sought. The ordinary meaning of Netherlands would seem clear enough. I can find nothing here, or for that matter in the rest of the Order, which could lead one to suppose that the draftsman, or the persons making the Order, contemplated the successors of the State of the Netherlands or any State other than the Netherlands. It would seem to me quite clear that they have not used language capable of including anyone else. The provision is, in essence, tantamount to a grant of the rights, powers and facilities afforded by the Act, and that grant is to one person only, by name, which person still exists. It may well be that diplomatic language is sufficiently elastic to include the Republic in the benefits of the treaty, but there seems to be no Order-in-Council applying the Act to the Republic in respect of this treaty, or of any other treaty.

" My opinion is confirmed by other considerations. The powers under the Extradition Acts are statutory powers, and should be exercised strictly in accordance with that statute, whether it be powers of officers acting under section 6, or of making Orders under section 2. Parliament, in committing the application of the Acts to the Executive, has yet required that all Orders made should within six weeks be laid before Parliament. It does not, as Sir Francis Piggott states in his book *Extradition* at p. 40, in a passage quoted by Sir Roland Braddell, expressly reserve any powers of modifying the Order, but there can be no doubt that it has full power to secure the revocation of any Order it disliked. What use is made of this provision is immaterial, there is yet a tacit assent to every Order-in-Council. I agree with Mr. Massey (for the applicant) that to treat the Acts as applied to a state, whose name has never appeared in any Order laid before Parliament, would vitiate this procedure and be an abuse of the power of applying the statute. It is true that an objection to an Order on this ground might be an objection to its validity, and so barred by section 5 of the Act of 1870, as, it is said, and I think wrongly, is my mere construing of the Order. Just as there is no evidence of any intention by the King in Council to apply the Acts to the Republic, so also I can see no tacit assent of Parliament. Moreover, the contrary contentions would render the law liable to change by what the Attorney-General tells us, I think rightly, is a legal use of the prerogative, in violation of those very principles which Sir Roland Braddell cited from pages 15, 29 and 32 of Sir Francis Piggott's book. It would also imply that the law is no longer to be ascertained from a perusal of the instruments in which it is supposed to be embodied, but can only be surely ascertained by what is, in practice, an application to the Foreign Office for its latest opinion of what certain terms mean. This is obviously contrary to all sound legal principles, and to all the history of our jurisprudence.

" In these circumstances it would seem to me that any proceedings based on a contrary assumption are misconceived and I think that the order applied for should be made."

[Report : (1950), 1 M.L.R. 228.]

State Succession—Treaties—Effect of Merger of States.

See Case No. 4 (*Babu Ram Saksena* v. *The State*).

VIII.—In Matters of Administration. Officials

Case No. 22 **State Succession—Public Officials—Termination of Mandate for Palestine—The Law of Israel.**

SIFRI *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as the High Court of Justice.
(Dunkelblum, Agranat and Silberg JJ.)
July 20, 1950.

THE FACTS.—This was an application for an order of *mandamus.* Section 1 of the Palestine Government Employees Ordinance No. 7 of 5708–1948 enacted by the legislature of Israel provided that any person who, on the last day of the Mandate, was in the service of the Government of Palestine and whose ordinary place of residence was on that day in the territory of the State of Israel, shall temporarily serve the Government of Israel. The same Ordinance made provision for the termination of such employment. The Applicant, an Arab, had been in the service of the Government of Palestine up to May 14, 1948 (the date of the termination of the Mandate), and had received salary in advance up to June 15, 1948. In April 1948 he left his permanent place of residence in Jerusalem and went to live in an area which subsequently, in May, was taken by the Israel Army, when the Applicant was interned as a civilian war internee. He was released early in 1949, when he applied to be "reinstated" in the service of the Government of Israel. This request was ultimately rejected and the present application was brought.

Held : that the application must be dismissed, following *Shimshon* v. *Attorney-General* (see *supra,* Case No. 19). The judgment of the Court was delivered by Dunkelblum J., who said :

"It is clear, therefore, that on the termination of the Mandate the officials of the former Mandatory Government possessed no right to employment by the new State of Israel, which is free to appoint its officials as it thinks best, whether from the ranks of the former officials, or from among those who never had served the Mandatory Government. However, the above-cited Ordinance gave the Mandatory officials a special status inasmuch as they were taken over by the new Government temporarily. The question, therefore, arises whether the Applicant meets the conditions laid down by the Ordinance.

"Even before the termination of the Mandate it was a matter of common notoriety that the Mandatory Government would cease its activities and the responsible Jewish organs . . . issued various orders by which the Jewish officials of the Mandatory Government were requested to remain at their posts after the termination of the Mandate. It was necessary to ensure that there would be no vacuum and the authorities had to see to the creation of a new civil service able to take upon itself the tasks incumbent upon the various government departments. The Ordinance was promulgated on June 9, 1948, that is, some three weeks after the establishment of the State. Most of the Government departments were by then working. . . . The Ordinance enabled other persons, who for some reason or other had not responded to the former order of the Jewish authorities, to enlist in the Government service in accordance with the conditions laid down in the Ordinance, which, for that purpose, established a short time limit, one week from its promulgation. The Ordinance does not purport to impose any punishment upon those who do not enlist within that period. True, such a person is ' deemed to have left the service ' but having regard to . . . the *Shimshon* case [*supra*] these words cannot be interpreted as meaning that, on the termination of the Mandate, the employees of the Mandatory Government automatically became employees of the Government of Israel, so that they had to perform some overt act to leave that service. The employees of the Mandatory Government who were not taken over by the Government of Israel were never in the service of the Government of Israel. Reporting for duty within the period laid down in the Ordinance was a prerequisite to acquiring the special status created by the Ordinance."

The remainder of the judgment deals with the interpretation of the Ordinance and with various points of municipal law which do not concern us here.

[Report.: *Piskei-Din*, vol. 4 (1950), p. 613; *Pesakim Elyonim*, vol. 5 (1951–1952), p. 197.]

NOTE.—In *Bergtal* v. *Schwartzman & Others*, decided by the same Court on July 14, 1950, the circumstances were different in that the Applicant, a veterinary surgeon formerly in the employ of the Government of Palestine, remained in the service of the Government of Israel, but before the promulgation of the Ordinance was given notice of termination of employment, to take effect on July 1, 1948. His appeal to a special tribunal appointed to deal with these matters was dismissed on the ground that he was discharged from government service prior to the Ordinance and the present application was for an order of *mandamus* to the said tribunal to rehear this appeal. At the same time the Applicant sought an order against other respondents that they reinstate him. Both applications were dismissed. The Court asked whether the Applicant was an employee of the Government despite the notice terminating his employment, which was anterior to the Ordinance. Counsel for the Applicant argued that the Government of Israel was bound to continue in employment officials of the Mandatory Government who had remained at work, and consequently any notice of dismissal had to conform to the provisions laid down by law in that regard.

In rejecting this argument the Court referred to its previous decision as to the effect of the Ordinance, as well as to the *Shimshon* case [*supra*], and continued :

" The consequence is that, but for the Ordinance, the employment of all the officials of the Mandatory Government would have come to an end with the termination of the Mandate, and without any necessity for any previous notice by the Government of Israel. The Ordinance conferred on certain officials a special status only if certain conditions were fulfilled. In the absence of any one of those conditions, it is impossible to speak of any special status in favour of former Mandatory officials. The Government of Israel is not responsible for the debts of the Mandatory Government, and certainly there is no basis for the view that the Government of Israel took upon itself other obligations of the Mandatory Government and that it is bound to employ all the employees of that Government." [Report : *Piskei-Din*, vol. 4 (1950), p. 634.]

In *Albohar* v. *Attorney-General*, decided by the Appeal Tribunal for the reinstatement of ex-servicemen in their previous employment on November 8, 1951, this principle was also applied in the case of a man who had been in the employ of the Palestine Government prior to his enlistment in the Israel Defence Forces. In rejecting his application for reinstatement in the equivalent Department of the Government of Israel on equivalent conditions of work, the Tribunal stated : " The State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government. The new State came into being as a result of the decision and the Declaration of the Provisional Government of Israel, as an independent State which neither received nor took over the authority of the Government of Palestine. The Mandatory Government left the country without transferring its authority to any other body. Furthermore, the State of Israel was established in only part of the territory which was formerly known as the mandated territory. There is no legal nexus having its origin either in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel." The Court relied on the decisions of the Supreme Court in the *Shimshon*, *Sifri*, and *Bergtal* cases and, with regret, dismissed the application. [Report : *Pesakim Mehoziim*, vol. 5 (1951–1952), p. 96.]

IX.—Binding Force of Laws and Judgments of Courts

State Succession—Continuity of Laws and of Judicial Organization—Judgment *In Personam* Against Non-Resident Foreigner not Enforceable in another Independent State—Merger of the States Concerned—Whether such Judgment becomes Enforceable—Merger of Indian States—Cessation of British Sovereignty—The Law of India. **Case No. 23**

CHUNILAL KASTURCHAND MARWADI AND ANOTHER, APPELLANTS *v.* DUNDAPPA DAMAPPA NAVALGI, RESPONDENT.

India, High Court of Bombay, Appellate Civil Division.
(Rajadhayaksha, Shah JJ.)
February 10, 1950.

THE FACTS.—In 1927 the appellants brought an action against the respondent and a partnership to which he belonged, for certain moneys owing. The case was heard at Belgaum, in the Province of Bombay, and judgment given against the defendants. Some of the latter were resident within the jurisdiction of the said Court, but Dundappa (who died while the suit was pending) lived outside the jurisdiction of British India, in the Native State of Jamkhandi. Neither he nor his heir, who likewise lived in Jamkhandi, entered any appearance at the trial of the issue.

In order to carry out the decree against his estate execution was transferred to a Court in Jamkhandi, in 1940. "Jamkhandi", to quote from the judgment of Rajadhayaksha J., "was then an independent State in the Deccan with full civil and criminal jurisdiction. Under s. 44 of the Civil Procedure Code, as then in force in that State, the Rajesaheb of Jamkhandi had passed an order on August 15, 1936, that the decrees of a civil Court in British India may be executed in the State Courts as if they were decrees passed by the civil Courts in the Jamkhandi State. In virtue of this order, execution was taken out against Irappa Damappa (heir to Dundappa Damappa). The judgment debtor appeared in answer to this darkhast and filed a written statement . . . in which he raised a preliminary contention that as he was a permanent resident of Mudhol and Jamkhandi State and as the decree had been passed *ex parte* against him by the Belgaum Court, it could not be executed against him by the Jamkhandi Court."

The trial Court held that "as the judgment debtor was neither a permanent resident within the territorial limits of the Belgaum Court and had not submitted to the jurisdiction of

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that Court, the question whether the decree of the Belgaum Court was a decree of a Court of competent jurisdiction had to be determined by principles of international law ".

Accordingly it held that " the *ex parte* decree could not be executed by the Jamkhandi Court . . .". The learned Judge therefore dismissed the darkhast on March 10, 1948.

While the case was thus proceeding the political scene in India had undergone a complete change. With the passing of the Indian Independence Act in 1947 Jamkhandi State acceded to the new Dominion of India. From March 8, 1948, it was administered as part of the Province of Bombay, and in August 1949 it lost all vestiges of its separate identity as the result of complete merger with that Province. As early as July 1948 the Civil Procedure Code, as in force in India, was extended *in toto* to Jamkhandi.

Chunilal Kasturchand appealed against the decision of the Jamkhandi Court to the High Court in Bombay. The first hearing was before Bavdekar J., in November 1949. He considered the case to be of such importance, because of the political changes which had taken place, that he referred it to a division bench.

Held : that the judgment must be enforced by the Jamkhandi Court. According to the rules of private international law a judgment *in personam* against a non-resident foreigner, who did not submit to the jurisdiction, would not be enforceable in a foreign Court ; but, in this case, on the relevant date, namely the date (March 10, 1948) on which the order in execution was passed by the Jamkhandi Court, the State was already part of the Dominion of India, and therefore not a foreign Court in relation to the Belgaum Court.

It was also held that although, as a general rule, a change in law would not affect the vested rights of the parties, the principle did not apply to the present case because the change that had come about was not by reason of any change in law but by reason of a change in the status of the judgment-debtor as a national of the Jamkhandi State on account of an Act of State.

The Court said (*per* Shah J.) :

" Now it is true that the cause of action for filing the suit in the Belgaum Court arose within the limits of the jurisdiction of that Court. The plaintiffs also obtained leave of the Court under s. 20 (*b*) of the Civil Procedure Code to sue the defendants who did not reside within its jurisdiction, and therefore the suit must be deemed to be properly instituted according to the provisions of the Civil Procedure Code, Act V of 1908, and the decree passed by that Court was binding upon those defendants who were British Indian Nationals, and was also binding upon all defendants residing within the limits of what was then British India. But the competency of the Court . . . at

Belgaum to try the suit either by reason of the cause of action arising within the limits of the Court or by reason of the leave granted by the Court, could not render the decree one passed by a Court of competent jurisdiction so as to make it enforceable against the respondent who was a foreigner and was not ordinarily residing within the jurisdiction of the Court which passed the decree and who had not submitted to the jurisdiction of the Court. It is well settled that even where there are reciprocity agreements under which decrees of Courts of one State are enforceable by Courts of another State, a judgment-debtor is entitled to raise all contentions which he could have raised if a suit had been filed on a foreign judgment; see *Jivappa Timmappa* v. *Jeergi Murgeappa* ((1916), I.L.R. 40 Bom. 551), and *Veeraraghava Ayyar* v. *Muga Sait* ((1914), I.L.R. 39 Mad. 24). It is also well settled that the competency of a Court to pass a decree against a foreigner is to be judged by reference to principles of private international law and not by reference to the municipal code of the State governing the Court which passed the decree. Their Lordships of the Privy Council in the case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* ((1894), L.R. 21 I.A. 171), observed (p. 185):

> 'In a personal action . . . a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced.' . . ."

After discussing the above case at some length, Shah J. continued:

" On behalf of the appellants it was contended that these rules would not apply to cases when execution of the decrees of a Court of British India, which was then the paramount power, were sought to be executed in the Courts of smaller satellites like Indian States; and in support of his submission, the learned advocate for the appellants relied upon the decisions in *Girdhar Damodhar* v. *Kassigar Hiralal* ((1893), I.L.R. 17 Bom. 662); *Rambhat* v. *Shankar Baswant* ((1901), I.L.R. 25 Bom. 528), and *Gaekwar Baroda State Railway* v. *Habib Ullah* ((1934), I.L.R. 56 All I.R. 828). . . . It is, however, clear from a reference to those decisions that the Courts in each of the cases there were considering whether suits could be filed against a foreigner even though he was not residing within the jurisdiction of the Court in which the suit was filed if the whole or part of the cause of action arose within the territorial limits of jurisdiction. . . . In those cases no question

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that a decree passed by the Court in which the suits were filed could be enforced by a foreign tribunal arose.

" In my view the competency of a Court to entertain an action and to pass a decree must be judged by the municipal law of the State when the question arises in a Court within the limits of the State which has constituted the Court which entertains the suit or passes the decree and is not to be judged by applying rules of international law. But where a question arises as to the enforcement of a decree or order passed by a Court in another territory, the rules of international law must prevail. . . .

" It must, therefore, be held that the decree of the Belgaum Court was at the date when the execution application was filed not capable of enforcement in the Courts of the Jamkhandi State.

" But the question still remains whether by reason of the agreement of accession entered into by the Jamkhandi Ruler and the ultimate merger of the Jamkhandi State in the territory of the Indian Union, after August 1947 the Courts which are functioning in that territory have ceased to be foreign Courts, and the decree of the Belgaum Court is enforceable in the Courts in that territory. It is now unquestioned that the Jamkhandi State has merged with the Union territory and that territory is now a part of the Bombay Presidency and is being administered by the Government of the Province of Bombay, and the Courts which are set up in that territory are the Courts of the Indian Union.

" The contention of the learned advocate for the appellants is that when the order was passed by the . . . District Judge, Jamkhandi, on March 10, 1948, the Jamkhandi State had acceded to the Indian Union, and the Governor-General of India was entitled to exercise the extra-provincial jurisdiction in that territory and since then the Jamkhandi State has merged with the Indian Union, and consequently the learned trial judge was not entitled but was bound to pass an order of execution ; and in any case this Court must take into consideration events which have transpired since the date on which the darkhast was filed and the order was passed by the learned trial Judge, and an order for execution should be passed so as to shorten litigation. In order to appreciate the argument advanced on behalf of the appellants as to the effect of certain orders issued under the provisions of the Extra-Provincial Jurisdiction Act it is necessary to examine the history of the Jamkhandi State and the course of the legislation which culminated in the territory of the State being merged with the Indian Union. The learned Judge then gave a detailed historical survey of this question and continued as follows :

" Now, it is true that prior to July 28, 1948, the Civil Procedure Code as passed by the Jamkhandi State was applicable to the State territory. That the Civil Procedure Code was in terms the same as the Civil Procedure Code, Act V of 1908, of British India as amended until 1944, with this alteration that the expression 'British India' wherever it occurred in the latter Code was substituted by the expression 'Jamkhandi State'. However, for all practical purposes there were two separate Codes of Civil Procedure of two different States. Even after the agreement of merger entered into by the Ruler of Jamkhandi State sometime on or after February 19, 1948, the Civil Procedure Code of the State was continued until July 28, 1948. The Civil Procedure Code of the Dominion of India was made applicable as from July 28, 1948. It is true that under para. 5 of the Order of July 28, 1948, the repeal of the State Code became effective as from July 28, 1948. But that circumstance does not support the argument that till July 28, 1948, the Courts functioning in the territory which was originally the Jamkhandi State were Courts of a State foreign to the Dominion of India. By the agreement of merger the sovereignty of the Jamkhandi State was merged into the Dominion of India and the Ruler of that State ceased to have authority over the territory of the Jamkhandi State. All the Courts, tribunals, authorities and bodies which were functioning in the territory till the date of the agreement of merger as constituted or recognized by the Jamkhandi Ruler continued as constituted under the laws of the Dominion of India. The sovereignty of the Jamkhandi State was extinguished. That is clear from the terms of the order issued by the Government of India on February 25, 1948, delegating its authority under the Extra-Provincial Jurisdiction Act. It is true that the Acts applicable to the State, if they were Acts which it was competent for the Jamkhandi Ruler to pass as if he had been a Provincial Legislature under the Government of India Act, 1935, were continued, but they had not the effect of continuing the sovereignty of the Jamkhandi State as a separate independent State. The fact that for administrative purposes the territory was not merged with the Province of Bombay is again irrelevant in considering whether the Courts functioning in that territory were Courts of the Dominion of India or the Courts of a foreign State. The authority of the State having lapsed and the Courts functioning therein having continued under the superintendence of the High Court at Bombay for all purposes, the Courts continued under the authority of the Dominion of India. As from the date of the agreement of merger the territory of the Jamkhandi State ceased to be an independent State or a foreign State, and the subsequent application of laws which were operating in the Dominion of India as from July 28, 1948, had only the effect of co-ordinating the administration of the State territory with the administration of the rest of the Dominion of India. The States Merger Order dated July 27, 1949, terminated finally the separate

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administration of that territory as an independent unit. If, therefore, on March 10, 1948, *i.e.*, on the date on which the trial Court passed an order, it was a Court not in an independent foreign State but a Court which was either constituted or continued by the authority of the Government of India, it could not be said that it was a foreign Court *qua* the Belgaum Court. Both the Belgaum Court and the Court . . . at Jamkhandi were Courts of the same State, and consequently when execution was sought of the decree passed by the Belgaum Court the Jamkhandi Court was bound to execute the decree.

" Mr. Datar's contention that the rights which the respondent had arose by reason of the Civil Procedure Code of the Jamkhandi State, and that they could not be taken away by reason of the repeal of that Code, and that the right to plead a bar to the execution of the decree of a foreign Court was a substantive right which could not be retrospectively taken away by reason of the repeal of the Civil Procedure Code of the Jamkhandi State, has, in my opinion, no substance. It is not by reason of the repeal of the Jamkhandi State Civil Procedure Code and the application of the Civil Procedure Code of the Dominion of India that any rights of the judgment-debtor are sought to be taken away. Substantially there has been no alteration of the law, but there has been an alteration in the status of the respondent and the character and authority of the Court as a result of which what was, at the date of the darkhast, a foreign Court has ceased by reason of the exercise of the sovereign authority of the Indian Dominion to be a foreign Court and the respondent has ceased to be a foreigner. The alteration is not one of law but of status. . . . Consequently the rule of private international law that a decree of a Court cannot be executed in a foreign Court against a person who was *qua* the Court which passed the decree a non-resident foreigner is no longer of any application. The rule of private international law has remained the same, but its operation in so far as it concerns the Court in which execution is sought is altered. . . .

" There is also no substance in the contention of Mr. Datar that the decree of the Belgaum Court continues to be a decree of a foreign Court in spite of the merger of the Jamkhandi territory with the Indian Dominion. The application of the rule of private international law can only arise when the decree is sought to be executed and not before. The relevant date for ascertaining the character of the decree could not be the date on which the execution application was filed in the Court of the trial Judge. In my view the relevant date is the date on which a Court is called upon to pass an order for the execution of a decree, and at that date the Jamkhandi territory was a part of the territory of the Indian Dominion. . . . I agree, therefore, that the trial Court must be held entitled to execute the decree against the judgment-debtor."

[Report: (1950), I.L.R. Bombay 640.]

NOTE.—See also *Dominion of India* v. *Hiralal* (A.I.R. (37) 1950 Calcutta 12), and *Golden Knitting Co.* v. *Mural Traders* (*India*) *in Sind Market, Karachi* (A.I.R. (37) 1950 Madras 293), where similar problems arose, but from the opposite point of view. Do judgments, originally passed in British India, but not executed until after partition, become foreign judgments in the Dominion of India, if the original decisions were given in Courts now in Pakistan, and if execution were transferred (the transfer but not the hearing of the execution proceedings taking place before partition) to Courts now in the Dominion of India? In both the above cases the question was answered in the affirmative. In *Dominion of India* v. *Hiralal* the High Court of Calcutta said: "The definition of 'foreign Court' (s. 2 (5) of the Civil Procedure Code) as adapted for the two Dominions clearly indicates that from and after the appointed date, Courts which were not foreign Courts before the said date will be foreign Courts because of the two different sets of provisions as contained in sub-section (2) of the Civil Procedure Code. British India, within which both the Courts in the present case were previously situated, has now ceased to exist and the test for determining, at the present stage, whether a particular Court is or is not a foreign Court in relation to another is to be ascertained and determined with reference to the law now in force and as under the altered constitutional position.

"In the absence of special provisions made in the Constitution, as were made about certain matters when Burma was separated from the then British India and constituted as a separate State, or as coming under any one of the Orders passed by the Governor-General under the Indian Independence Act, the law in one State cannot be held to be applicable or attracted in another and separate State. In accordance with the accepted principles of International Law the Dominions of India and Pakistan are now two separate sovereign and foreign States."

State Succession—Jurisdiction of Courts—Renunciation of Territory—Treaty of Peace between Italy and the United Nations of February 10, 1947—Eritrea. **Case No. 24**

SORKIS *v.* AMED.

Italy, Court of Cassation (*United Sections*). *August* 26, 1950.

THE FACTS.—This was an appeal to the Italian Court of Cassation from a decision of the Court of Appeal of Asmara (Eritrea), dated April 10, 1948. The respondent contended that the appeal was inadmissible, seeing that according to Article 23 and Annex XI of the Treaty of Peace between the United Nations and Italy, of February 10, 1947, which was

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ratified by Italy on August 2, 1947, Eritrea was no longer part of the Italian possessions.

Article 23 provided as follows :

> " (1) Italy renounces all right and title to the Italian territorial possessions in Africa, *i.e.*, Libya, Eritrea and Italian Somaliland.
>
> " (2) Pending their final disposal, the said possessions shall continue under their present administration.
>
> " (3) The final disposal of these possessions shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America and of France, within one year from the coming into force of the present treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments, which is reproduced in Annex XI."

Paragraph 3 of Annex XI provided as follows :

> " If with respect to any of these territories the Four Powers are unable to agree upon their disposal within one year from the coming into force of the Treaty of Peace with Italy, the matter shall be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it."

The final disposal envisaged in Article 23 (3) had not yet taken place at the time in question.

Held : that the Court of Cassation had jurisdiction. The Court said :

" The respondents contend that no jurisdiction exists, seeing that Italy has lost her sovereignty over Eritrea as a result of the renunciation contained in Article 23 (1). But in this form the question is not properly put. The exercise of jurisdiction over a particular territory is not insolubly connected with the exercise of sovereignty over that territory. There are examples that jurisdiction was exercised in foreign countries, not subject to the sovereignty of the country to whom the organs exercising jurisdiction belonged. Such are the exercise of jurisdiction in territories which are *res nullius*, in virtue of capitulations, over ships on the high seas or in accordance with rules of customary or conventional international law. In regard to the loss or cession of territories, it is doubtful whether in principle these legally relevant facts result in the severance of these territories from the legal system of the State which has suffered the loss. But even if this were correct, the possibility is not excluded that special provisions temper and modify the general application of the principle, having regard to the complexities and peculiarities of the concrete situation. Such provisions may postpone any change in the organisation of the courts and their transfer to the successor State as the new sovereign until a subsequent date. Such a date may be regarded as more convenient in the sovereign discretion of the contracting States. Thus the question is not exhausted by stating that Italy has renounced all right and title to the Italian territorial possessions. It requires a thorough examination which investigates the particular legal situation arising in respect of these territories in virtue of the Treaty.

" The fact that the territories were separated from Italy does not necessarily lead to the conclusion that they were definitely detached. The Treaty itself does not decide their final fate. It is restricted to an announcement of the procedure whereby it is to be determined to whom these territories are to be allocated. It does not appear that the loss of rights on the part of Italy was accompanied by the immediate acquisition of title by any other entity. It cannot be said, therefore, that the right to exercise jurisdiction vested in the new holders of the title to these possessions during the period between the conclusion of the Treaty and the final decision disposing of these territories. Instead, the letter and the spirit of the Treaty lead to the conclusion that the latter envisaged only a unilateral renunciation and *derelictio*, and did not contemplate a cession in the true sense of the word in favour of a particular body. Not only the literal wording of the provision of the Treaty speaks in favour of this interpretation. It is supported by the consideration that the article is included in Part II of the Treaty which contains political provisions and not in Part I which deals with territorial provisions. It emerges from a comparison with the wording of other articles, such as Article 11 (' Italy cedes by this Treaty to Yugoslavia its sovereign rights over . . .') and Article 14 (' Italy cedes to Greece its full sovereign rights over . . .'). This comparison shows that the parties were aware of, and applied, the distinction between cession and renunciation. The former implies a transfer of a territory by one entity to another, the latter means simply the release of rights by an entity without a transfer to another. It cannot be argued that renunciation is, by definition, a unilateral act, and that this is not a case of renunciation, seeing that the article in question is included in an instrument which is clearly bilateral. However, it does not appear that the legal character of an act can be determined by the bilateral nature of the instrument in which it is included. It may well be possible that the inclusion of a provision is occasioned solely by the fact that it is connected with a broader and more complex arrangement of a bilateral character. Having regard to these considerations it appears that Article 23 (3) confers upon the Big Four, in the first place, and then upon the United Nations, a mere power of decision. They may determine to whom the sovereignty over the territories is to belong finally.

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" It is perhaps not out of place to mention here that the Treaty was concluded at a time when the problem of the future of the former Italian colonies was being examined by the deputies of the Foreign Ministers of the Big Four, but when no decision had yet been reached. Article 14 of Annex XI reflects this situation by stating that the deputies of the Ministers will continue to examine this question. The term ' continue ' shows that the States whom the deputies represented did not intend to modify their position in respect of the territory which was the object of the examination. They were satisfied with the renunciation on the part of Italy. This renunciation establishes in law that Italy had lost her rights. The Great Powers reserved for themselves the power of disposal which they had assumed already previously. This power is, to a certain extent, comparable to that of an arbitrator in municipal law. He does not base himself upon ownership in the thing which forms the object of his award. Instead, he finds the basis of his power in the common intention of the parties who have appointed him.

" The provisions of the Treaty are in accordance with this trend. Thus in Annex XI it is said in Article 1 that ' The Governments . . . agree that they will jointly determine ', and in Article 2 : ' The final disposal . . . shall be made by the Four Powers.' In particular Article 2 of Annex XI is relevant here. It shows that the power of decision is not unlimited and absolute, as it would be if full sovereignty had been assumed. It implies that certain criteria will be observed. They may be of necessity elastic and discretionary, but they determine the object and the limits of the award. For Article 2 states : ' The final disposal of the territories concerned and the appropriate adjustment of their boundaries shall be made by the Four Powers in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of other interested Governments '. It may be useful to recall also the provisions of Article 4, second sentence, which states : ' they shall send out commissions of investigation to any of the former Italian colonies in order to supply the Deputies with the necessary data on this question and to ascertain the views of the local population '.

" This analysis of the Treaty confirms the view that it does not envisage the immediate assumption of sovereignty on the part of some other subject of international law. Instead it provides for a period of transition, pending a final decision. During this period ' the said possessions shall continue under their present administration '. According to the spirit and the arrangement of the Treaty this period was to be of short duration. Thus there were good reasons for not modifying the existing legal system and for not disturbing the ordinary development of private life and legal relations by successive changes at brief intervals.

" If it is thus true that the previous legal order has remained during the period of transition, it is impossible to deny that the bodies which exercise jurisdiction in Eritrea are organs of the Italian Government and that they derive their powers from Italian law. It is well known that at the time when the Treaty was concluded and to which the Treaty refers (it speaks of ' actual administration '), Eritrea was subject to belligerent occupation. It is true that the Treaty has changed the legal basis in virtue of which the occupying force exercises its powers. They are no longer derived from military conquest but from a treaty. Nevertheless, for practical reasons the Treaty was not intended to introduce modifications of the existing legal system. It has not altered the limits which are imposed by the general principles of international law upon the powers of an occupant. According to these principles . . . belligerent occupation does not abrogate or suppress the legal system of the occupied State and does not affect in any way the ties between the latter and its organs. These continue to exercise their functions in the name of the occupied State. The occupant cannot modify the laws of the occupied State, unless absolutely prevented.[1]

" If these considerations are correct, it is possible to conclude that the courts in Eritrea have not lost their original character of Italian Authorities. This conclusion is confirmed by the fact that they continue to apply the rules of Italian procedure which were in force in Eritrea and that their personnel consists of persons who have not ceased to be members of the Italian judicial service. Naturally, these authorities no longer exercise their jurisdiction in virtue of the sovereignty which Italy formerly exercised over these territories. They do so in virtue of powers which were delegated to Italy implicitly by the Treaty of Peace. It follows that the Italian Court of Cassation which forms the apex in the hierarchy of Italian courts retains its jurisdiction in respect of decisions pronounced by the Courts in Eritrea, seeing that this jurisdiction is recognized by the courts there.

" It cannot be contended that this jurisdiction has been curtailed by Proclamation No. 23 of 23 June 1945, issued by the Military Government of Eritrea. This proclamation excluded appeals against the decisions of the Court of Appeal of Asmara. As stated before, the occupying power is bound by the general principles of international law to respect the laws and local regulations of the occupied territory, except only if absolutely prevented.[2] It may be assumed that the acts of subjects of international law comply with the rules of international law. Also it is necessary to keep in mind the time when the Proclamation was issued (1945). As a result it is possible to interpret it in the sense that the determining factor was the inability of the inhabitants of Eritrea to maintain relations with Italy, seeing that a state of war existed still. For this reason the duration of the Proclamation may be taken to have been limited, according to the intention of the Military Government which enacted it, to the time in which this inability to maintain relations with Italy existed. *Cessante ratione legis cessat et ipsa lex.*

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[1] The Court referred to Article 43 of the Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907.

[2] The Court referred to Article 43 of Hague Convention IV of 1907 and to the corresponding article in the Convention of 1899 which was ratified by Italy.

"However, even if this view should not be accepted, it is certain that this provision is irrelevant in so far as the municipal law of the occupied State is concerned. This Court has held so on several occasions.[1] It is well known that the legal systems of the occupying and of the occupied State are entirely distinct from each other. They are exclusive and original. For this reason acts done by an occupying State in disregard of international law do not become part of the law of the occupied State, unless the latter incorporates them expressly.

"Accordingly, in the opinion of the court, the argument of the respondent must fail who contends that the illegality of the Proclamation can only be considered in an international court. It fails . . . not because this Court declares the Proclamation to be illegal, but only because this Court does not apply it, on the ground that it does not form part of Italian law. The latter, it may be remembered, conforms with the generally recognized rules of international law (Article 10 of the Constitution of the Republic of Italy).

"The last objection of the respondent is also unfounded. He argues that the appellant has contradicted himself by first lodging an appeal with the Court of Appeal of Asmara. In his opinion, the appellant thereby recognized the changes introduced by the Military Government, which created this court to replace that of Addis Ababa. The latter was competent according to the rules in force at the time of the military occupation. . . . The Military Government did not create a new court, but only allotted to the existing Court of Addis Ababa a new seat which was more suitable for dealing with matters arising in Eritrea. This regulation, imposed by the nature of the circumstances, has not altered the character of the authority or its place in the organization of Italian courts. It was simply a change of its original seat. . . ."

[Report: *Foro Italiano*, 72 (1950) I, 985.]

NOTE.—Cf. *Banin* v. *Laviani and Ellena* (*Annual Digest*, 1949, Case No. 27). As regards appeals from the courts in Libya see *Farrugia*

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[1] The Court referred to its decisions of July 24, 1948, No. 1230, *Foro Italiano* Repertorio 1948; *S.* v. *Occupazione del territorio nazionale*, No. 38; and of August 12, 1947, n. 1504, *loc. cit.*, 1947, No. 37.

v. *Nuova Compagnia Generale Autolinee*, decided on February 17, 1951. [Reports: *Foro Italiano*, 74 (1951), I, 720; *Giurisprudenza Italiana*, 103 (1951), I, 1, 567, with a note by Cansacchi.]

State Succession—Continuation of Law—Repeal of Former Legislation—Effect upon Confiscation of Property in Pursuance of such Legislation—The Mandate for Palestine. **Case No. 25**

TYRE SHIPPING CO. LTD. *v.* ATTORNEY-GENERAL.

Israel, Admiralty Court.
(Dunkelblum and Cheshin JJ. and Mr. Zukerman.)
June 22, 1950.

THE FACTS.—On March 8, 1947, the s.s. *Ben Hecht*, flying the Honduran flag, was seized by a British naval vessel within the territorial waters of Palestine. On board were some six hundred " illegal " immigrants, that is to say, Jews who were not in possession of valid entry documents into Palestine. On March 9, 1947, the vessel was brought into the port of Haifa, its crew were placed under arrest, and the passengers transported in British bottoms to Cyprus. After negotiations with the authorities, the crew were released and returned to America. The vessel herself was confiscated by the authorities in April 1947, the confiscation being confirmed, on December 3, by the Haifa District Court, under section 12 of the Immigration Ordinance, 1941, as amended by Regulation 107 of the Defence (Emergency) Regulations, 1945.

On the termination of the Mandate for Palestine (May 15, 1948) the vessel was lying at Haifa. On July 15, 1948, the Requisitioning Officer of the Israel Defence Forces purported to requisition the said ship by serving a requisition notice on the lawyer who was then representing the Tyre Shipping Company, the plaintiffs in the present case. The said company claimed to be the owners of the vessel before confiscation. In compliance with the requisition order, the vessel was forthwith handed over to the competent authorities, and a receipt was given in due course. Negotiations followed regarding appraisal of the vessel and the payment of compensation, under the Defence (Compensation) Ordinance, 1940, but when these negotiations broke down legal proceedings were brought in the Admiralty Court. In the course of these proceedings it was argued that not the Plaintiffs but the Government of Israel were the owners of the vessel—on the basis of the earlier decision of the Haifa District Court.

Immediately after the establishment of the State of Israel, it was enacted that " Sections 13 to 15 of the Immigration Ordinance, 1941, and Regulation 102–107 C of the Defence (Emergency) Regulations, 1945, are hereby repealed. Any Jew who at any time entered Palestine in contravention of the

Case No. 25 *Contd.* laws of the Mandatory Government shall, for all intents and purposes, be deemed to be a legal immigrant retroactively from the date of his entry into Palestine."

Held : that ownership is determined by the law in force on the date of the action. Following the repeal of the Mandatory legislation under which the vessel was confiscated, the Government of Israel is not the owner, and the claimants must establish their ownership in the usual way. The judgment of the Court was given by Cheshin J., who said (after describing the Israel legislation of 1948) :

" From the fact that the immigrants who were on board the vessel are deemed today to be legal immigrants retroactively from the date of their entry into the country, it is not possible to say that the vessel which brought them was an instrument used for the performance of an illegal act. For this reason alone the confiscation of the vessel is deemed null and void, also retroactively. . . .

" The confiscation to the Government of Palestine was ordered, under section 12 of the Immigration Ordinance, 1941, as amended by Regulation 107 of the Defence (Emergency) Regulations, 1945, simply because the vessel had been used, with the knowledge of her skipper, owners or agents, to assist in performing, or in an attempt to perform, an act regarded as illegal by that Ordinance. Indeed, this is brought out in the words of the confiscation order of the Haifa District Court of December 3rd, 1947. . . . That may have been correct then. It is true that, when caught, the vessel did have on board passengers who were engaged upon an illegal enterprise, and the vessel was being used by them in the performance of that illegality. But we are now in the year 1950. The fate of the vessel is to be determined not in the light of the circumstances subsisting when she was captured and according to the law in force then, but according to the law in force now, and according to the way in which the law today regards those earlier circumstances. How does the law today look upon the circumstances in which the vessel was captured ?

" The answer is simple and clear. A vessel is sailing on the high seas approaching the shores of the motherland with some 600 Jews aboard. The gates of Israel are wide open to them, and there is no doubt that they will be allowed to enter when they arrive, for they have the status of legal immigrants ' for all intents and purposes '. A man-of-war captures the vessel, and after the former authorities had dealt with the passengers, they confiscated the ship. Why ? Because she was transporting Jewish passengers, whom the law in Israel today regards as persons whose immigration was entirely lawful from the date of their entry into Palestine, that is to say, as persons who never transgressed the provisions of the Immigration Ordinance. From the point of view of the law in force today, the vessel was never engaged on any illegal enterprise, but to the contrary, was engaged upon the meritorious work of bringing Jews back to Palestine. . . . Consequently, not only has the moral basis of the confiscation order gone, but also its legal basis. The confiscation order is null and void retroactively. There being no crime and no criminal, there is no instrument used for committing a crime. . . .

" This seems to have been the view of the authorities in Israel after the establishment of the State, as the facts in this case demonstrate. Those authorities did not, at first, regard the vessel as Mandatory property which had fallen to them, with which they were free to do as they liked, but requisitioned it, sending a requisition notice to the man whom they thought represented the owners. Subsequently they sent to that same person a survey of the vessel, and a receipt for her. In all the lengthy correspondence . . . there is not the slightest hint that the authorities regarded the vessel as their own. That shows that the argument was conceived later. For reasons we have given, we cannot accept that argument."

[Reports : *Piskei-Din*, vol. 4 (1950), p. 288 ; *Pesakim Elyonim*, vol. 5 (1951–1952), p. 55.]

NOTE.—For the views of the Mandatory Courts on illegal immigration, cf. *Molvan* v. *Attorney-General for Palestine*, *Annual Digest*, 1946, Case No. 23 ; *ibid.*, 1948, Case No. 37.

X.—Effect upon Nationality

State Succession — Effect upon Nationality — Transfer of Sovereignty of Former Dutch East Indies to Republic of the United States of Indonesia (Republik Indonesia Serikat)—Netherlands Indonesian Union—" Netherlands Subject " as Opposed to " Netherlander "—Dual Nationality. **Case No. 26**

In re ANDRIES (FRANCHISE CASE).

Holland, Cantonal Court, The Hague. *April* 5, 1950.

THE FACTS.—A certain Andries, a " Christian-native " under the former Netherlands Indies legislation, applied in 1950 for registration on the electoral roll of the municipality of The Hague, where he was domiciled. Registration was refused on the ground that he had acquired Indonesian nationality under Article 4, paragraph 1,[1] of the Netherlands-

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[1] Article 4, para. 1, provides : ". . . Netherlands subjects :—non-Netherlanders who are of age and who, immediately before the transfer of sovereignty, belonged to the indigenous population (*orang-orang jaing asli*) of Indonesia, shall acquire Indonesian nationality, but if they are born outside Indonesia and reside in the Netherlands or in a territory not under the jurisdiction of either partner in the Union, they shall, within the time limit therefor stipulated, be entitled to opt for Netherlands nationality ".

Case No. 26 *Contd.* Indonesian Convention of December 27, 1949, which dealt with the status of citizens on the occasion of the transfer of sovereignty. Andries appealed against the refusal of registration.

Held : that the appeal must succeed and Andries's name be inscribed on the electoral roll. It was true that the applicant had acquired Indonesian citizenship, but this was no bar to his retention of his pre-existing status of " Netherlands subject " under the Act of February 10, 1910. Under Article 8 of the Convention on Transitional Measures, existing laws were to remain in force unchanged in so far as they were not irreconcilable with the transfer of sovereignty, the provisions of the Union Statute, the Convention on Transitional Measures, or other Netherlands-Indonesian agreements. The aim and nature of the Netherlands-Indonesian Union, as defined in the Union Statute (*Staatsblad* No. J.570 of 1949), offered no obstacle to the continuance on historical as well as on moral grounds of certain ties between subjects of the Indonesian State and the Netherlands. This was especially the case in regard to " Christian-natives ", who for many generations had professed and lived up to the same religious and ethical principles as the Dutch, and who had given evidence of their solidarity with them. Since " Netherlands subjects " had, under certain constitutional and legal provisions, the franchise —and were eligible—for representative bodies in the Netherlands, such as the States General, and provincial and municipal councils, the applicant was entitled to registration on the electoral roll.

[Report : *N.J.*, 1950, No. 407.]

Case No. 27 **State Succession—Effect upon Nationality—The Law of Israel.**

The question of the effect of the termination of the Palestine Mandate upon the nationality status of former Palestine citizens who became resident in Israel, gave rise to a conflict of judicial opinion in Israel. While, by virtue of Israel legislation, there was a possibility of reading the Palestine Citizenship Orders-in-Council, 1924 to 1939, as if they had become Orders relating to Israel citizenship, there was no specific statutory provision regulating Israel nationality until the enactment of the Nationality Law, 1952.

(*a*) In *Re Goods of Shiphris*, decided by one Judge of the Tel Aviv District Court on August 13, 1950, it was *held*, in an undefended probate action, that such persons were stateless. [Report : *Pesakim Mehoziim*, vol. 3 (1950–1951), p. 222.]

(*b*) However, in *A.B.* v. *M.B.*, decided by another Judge of the same Court on April 6, 1951—a defended matrimonial cause—the same question arose. Referring to the *Shiphris* case, the Court pointed out that it was an order rendered in an undefended action, so that the Judge was free to disregard it despite its persuasive authority. On the nationality question the Judge said: " It seems to me, with all respect, that the point of view according to which there are no Israel nationals, is not compatible with public international law. The prevailing view is that, in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitant of the ceding State becomes automatically a national of the receiving State (see Oppenheim, *International Law*, vol. 1, § 219, and particularly notes 3 and 4 on page 503 of the 7th edition). The same opinion is expressed by Schwarzenberger, *International Law*, 2nd edition, vol. 1, page 166. Lauterpacht also states the same rule in a case of subjugation, *loc. cit.*, page 522, particularly footnote 6. If that is the case, is it possible to say that the inhabitants of part of a State which is transformed into an independent State are not *ipso facto* transformed into the nationals of that State? So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals—a phenomenon the existence of which has not yet been observed." [Report: *Pesakim Mehoziim*, vol. 3 (1950–1951), p. 263, at p. 272.]

(*c*) In *Oseri* v. *Oseri*, decided by the Tel Aviv District Court on August 7, 1952, the Court made the following remarks:

" Let us assume that the litigants were Palestinian citizens, have they become Israel nationals by virtue of the Law and Administration Ordinance, enacted after the establishment of the State? The nationality of the inhabitants of Palestine derived from the Nationality Law of the country, that is to say, the Palestine Citizenship Order-in-Council of 1925. The Israel Nationality Law was enacted only a few months ago and some time after this case had been instituted. If we can bring the Palestine Citizenship Order-in-Council within the scope of the law which was in force in Palestine on 14 May 1948, then, under section 11 of the Law and Administration Ordinance, 1948, it might be possible to regard the parties as Israel nationals who are not foreigners. . . .

" Nationality involves the grant of a certain status to the citizen, and it creates a bond of loyalty between the State and the citizen. The loyalty which had been created by the Palestine Citizenship Order-in-Council was towards the Mandatory Authorities, as appears indeed from the form of oath required of a naturalized citizen by that law. The Mandatory Authority has now disappeared and it is difficult to reach a deduction that that very law which established a bond of loyalty between the Mandatory Government and its inhabitants

Case No. 27 *Contd.* can now create a new nationality and a new bond of loyalty, between the State of Israel and its inhabitants. Such a bond cannot automatically devolve.

"The former law was enacted following the Treaty of Lausanne after the First World War, and following the Mandate over Palestine. Both these have ceased to form the basis for the existence of the State and of its laws. A new international basis has been created for the existence of the State, and all those provisions of the former Citizenship Order-in-Council which are due to the Mandate or the Treaty of Lausanne are devoid of substance in the State of Israel. Therefore, the Order-in-Council in its entirety is not satisfactory and is inappropriate to the situation following the establishment of Israel and the changes which that event has brought. Following are examples of the inapplicability of the Order-in-Council to the new conditions: Article 1 confers Palestinian citizenship on Turkish nationals permanently resident in Palestine on August 1, 1925. Articles 2 and 4 deal with the nationality status of certain other classes of Turkish nationals. The Order-in-Council confers citizenship on every person born in Palestine. Many of the absentee Palestinian Arabs were born in Palestine and many of them enjoyed Palestinian citizenship. It will not cross any person's mind to say that persons such as these are citizens of the State of Israel, or that they are under any obligation to be loyal to the State today. Reasons such as these persuaded the Knesset to repeal the Palestine Citizenship Order-in-Council, in section 18 of the Nationality Law, 1952, with effect from the date of the establishment of the State. Consequently the defendant remained stateless until after this case was instituted. My conclusion, therefore, is that, in the period between the establishment of the State and the entry into force of the Nationality Law, the inhabitants of Israel were not Israel nationals within the legal meaning of the term national." [Report: *Pesakim Mehoziim*, vol. 8 (1953), p. 76.]

(*d*) The Supreme Court has also expressed its view as being that Palestinian citizenship "no longer exists, and has not existed, either in the territory of the State of Israel or in the parts of Palestine occupied by the Arab States, or anywhere else in the world, after the establishment of the State of Israel in part of Palestine, and the annexation of the remainder of Palestine to other States." *Hussein* v. *Governor of Acre Prison*, decided on November 6, 1952. [Report: *Piskei-Din*, vol. 6 (1952), p. 897.[1]]

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[1] On Israel nationality see Rosenne, "La Loi israélienne sur la nationalité 5712–1952 et la loi du retour, 5710–1950", in *Journal du Droit International* (Paris), vol. 81 (1954), p. 4.

XI.—Miscellaneous

State Succession—Miscellaneous—Vesting Orders under Trading with the Enemy Legislation of Former Sovereign—Conception of Enemy—Change of Sovereignty—State of War Prior to Change of Sovereignty—Effect of Change of Sovereignty. **Case No. 28**

DIAMOND *v.* (1) MINISTER OF FINANCE. (2) CUSTODIAN OF ENEMY PROPERTY.

Israel, Supreme Court sitting as the High Court of Justice.
(Dunkelblum, Rabbi Assaf and Silberg JJ.)
April 20, 1950.

THE FACTS.—This was an application for an order to the respondents to show cause why a vesting order made under the Trading with the Enemy Ordinance, 1939, should not be cancelled. The applicant and his two sisters had inherited from their father a house in Jerusalem. The father—a Jew—had been living in Poland during the Second World War and his property, including the house, was vested in the Mandatory Custodian of Enemy Property. It remained so vested in the Israel Custodian of Enemy Property after the termination of the Mandate. The Custodian had not refused to cancel the vesting order as such, but he had indicated his inability to transfer possession of the house to the applicants on the ground that it had been allocated to other persons who had prior rights of possession in view of the housing shortage. The Custodian also argued that he was under no obligation to transfer the property to its owners on the ground that his prior duty was to hold the property in accordance with the provisions of the Trading with the Enemy Ordinance, 1939.

Held : that after the establishment of the State of Israel the Trading with the Enemy Ordinance could not apply in the circumstances before the Court. A discretionary power to release property in these circumstances had become a duty. There was no state of war between Israel and those countries which were enemy States for the purposes of the Trading with the Enemy Ordinance. The Court said, *per* Dunkelblum J. :

" Section 9 of the Trading with the Enemy Ordinance gave the High Commissioner the right to appoint a Custodian of Enemy Property, in order to prevent payment of moneys to the enemy, and to protect enemy property which would ultimately be disposed of in accordance with arrangements to be made on the termination of the war. The Ordinance was enacted following the English precedent and many decisions rendered during the First World War. For many reasons upon

Case No. 28 *Contd.*

which I do not need to enlarge, the opinion prevails in England that the expression ' enemy property ' ought to comprise also the property of people who are not enemies in the usual sense of that word but who dwell in territory occupied by the enemy. In the light of this view, the property of citizens of neutral states, and also the property of Britain's allies, will be regarded as enemy property for the purposes of the Trading with the Enemy Act, if its owner resides in territory occupied by the enemy. The principal object of this, during the war, was to prevent the enemy from obtaining any enjoyment whatsoever from the property of people residing within his jurisdiction. But it is not to be expected that such property which, for example, belongs to Britain's allies, would be a matter for negotiation with the enemy States at the time of making peace. This conception finds expression in our law, as will be seen.

" What are the consequences of the arguments advanced by the respondents ? In the view of their Counsel, every Jew as aforesaid who invested his money in Palestine is still to be considered as an enemy. The property of such a Jew, whether he has survived his martyrdom or whether he has fallen a victim and left his children in Palestine, is enemy property and must remain vested in the Custodian in order to take account of possible arrangements to be made at the conclusion of peace. It is difficult to understand how it could cross learned Counsel's mind that the Government of Israel would use the property of those Jews as an object of negotiation with some other Government, or would use this property as a pledge for the payment of compensation due from some other State. Is the property of the victims of the Nazis—who were done to death in Treblinka or Maidanek—to be regarded as enemy property in the State of Israel ?

" Counsel for the respondents overlooked the situation in Israel as it is today. By section 5 (2) of the Trading with the Enemy (Custodian) Order, 1939, the Custodian is entitled, under certain conditions, to transfer property vested in him to such persons who would be entitled to receive it but for the Trading with the Enemy Ordinance. The very fact that the legislature found it proper to include such a provision in the laws dealing with enemy property, proves that he foresaw that there would be cases in which the Custodian, even before the end of the war (and on certain conditions), could transfer property vested in him to persons who would be entitled to receive it but for the provisions of the Ordinance. It is a fact that it was usual in the period of the Mandate to return property to technical enemies of this kind, after they had immigrated into the country and after the Second World War had ended *de facto*. Reading today the said section of the Trading with the Enemy (Custodian) Order, together with section 11 of the Law and

Administration Ordinance, 1948, which provides that the law which was in force in Palestine on May 14, 1948, will remain in force . . . subject to changes necessitated by the establishment of the State and its Authorities, we reached the inescapable conclusion that the discretion which the Custodian had, during the period of the Mandate, to transfer property, has become an obligation for the Custodian in the State of Israel, at all events so far as concerns Jews resident in Israel.

" The purposes for the appointment of the Custodian as specified in section 9 of the Ordinance are two :

" (1) to prevent the transfer of money to the enemy ;

" (2) to protect the property against arrangements to be made on the restoration of peace. There is no state of war today between Israel and those countries which were enemy States for the purposes of the Trading with the Enemy Ordinance. There is no need for special provisions to prevent transfer of money to those States, and quite obviously there is no need for such measures *vis-à-vis* Jews resident in Israel, whatever their origin. There remains the second objective. As to this, it is inconceivable that the Government of Israel will use the property of these Jews as a pledge for compensation due to it from any other State, or that such property will be the object of arrangements to be made with other States. I cannot, therefore, accept the view of the second respondent that he is entitled to consider and to decide whether to return such property to a Jew resident in Israel. As has been stated, this discretion has become a duty, a duty to return such property to the persons entitled to it. The second respondent, therefore, was in error in thinking that he was entitled to deal with property entrusted to him as if it were his own. The return of the property is not an act of grace, but a duty. This, in my opinion, is the conclusion which develops from the situation that has been created with the establishment of the State of Israel.

" In order to remove all doubt I wish to stress that what has been said above applies only to cases of the type before us, and does not detract from the full validity of the Trading with the Enemy Ordinance in other circumstances when it is necessary to take account of other factors which are irrelevant here. And even more important, what has been said above does not affect the application of the Ordinance to persons who are not enemies in the technical sense."

[Report : *Piskei Din*, vol. 4 (1950), p. 164.]

State Succession—Miscellaneous—Agreements between Seceding New State and Old State.

See Case No 49 (*Aponno et Al.* v. *The State of the Netherlands* (*Amboinese Soldiers' Case*)).

G—MISCELLANEOUS

Case No. 29 **Holy See—Concordat between Holy See and Germany—Provisions of Concordat as Part of German Municipal Law—Right of Priest to Refuse Testimony—Equality of Rights as between Catholic and Protestant Clergy.**

CONCORDAT (SECRECY OF CONFESSIONS) CASE.

German Federal Republic, Higher District Court ("Landgericht") of Fulda. March 24, 1950.

THE FACTS.—By virtue of Article 383 (1) of the German Civil Procedure Act clergymen may refuse to give evidence on matters communicated to them in the exercise of their religious functions; by virtue of Article 385 (2) of the same Act they are not entitled so to refuse if the person who has communicated the matters concerned has relieved them of their duty to preserve secrecy. A Protestant clergyman contended that, notwithstanding his having been relieved of his duty to preserve secrecy, he was entitled to refuse to testify, on the ground that Article 9 of the Concordat of July 20, 1933, between the Holy See and Germany conferred an absolute right of refusal, and that the Concordat took precedence over Article 385 (2) of the Civil Procedure Act.

Held: that the Concordat was part of German municipal law and as such capable of overriding the provision contained in the Civil Procedure Act, and that although originally applicable only to Catholic priests, it was equally applicable to Protestant clergymen who, by virtue of the Basic Law of the Federal Republic of Germany, were entitled to be treated on a basis of equality with Catholic clergymen. The Court said:

" If in the present case the Court had been concerned with a Catholic priest, the latter would have been entitled to refuse to testify even if the defendant had relieved him of his duty to preserve secrecy. This follows from Article 9 of the Concordat of July 20, 1933. This article provides that a Catholic priest cannot be compelled to give evidence before courts and other official bodies on matters communicated to him in the exercise of his religious functions and therefore falling within his duty to preserve secrecy. . . . To that extent Article 9 of the Concordat constitutes a 'lex specialis' in relation to Article 385 (2) of the Civil Procedure Act. We need not consider whether the continued operation of the Concordat can be based upon the continued existence of the German Reich or the constitutional identity of Germany. Whichever view may be taken, the Concordat must be regarded as being equivalent to a municipal statute. This follows from the judgment of the Supreme

Court of Bavaria of December 10, 1934. This judgment states that the Concordat became German municipal law by reason of the fact that the Minister of the Interior and the Minister of Foreign Affairs had had an announcement published in the *Reichsgesetzblatt* of September 12, 1933, concerning the entry into force of the Concordat, and that this announcement preceded the actual publication of the Concordat. In addition, according to the view expressed by the Supreme Court of Bavaria, there was enacted the Law of September 12, 1933, which empowered the Minister of the Interior to promulgate the requisite regulations to ensure the implementation of the Concordat. Thus the Concordat was transformed into a German municipal statute.

" Although it is true that the provisions of the Concordat are directly valid only in relation to the Catholic Church, they must be applied by analogy to the Protestant Church in all cases which are identical, or at least similar, in their application to the Protestant and Catholic Churches. This is required by the principle of equality which flows from the religious neutrality of the State and which has been part of German Constitutional Church Law since the days of the Weimar Constitution. Above all the legislature is, by virtue of Article 1 (3) of the Basic Law of the Federal Republic of Germany, bound by the basic rights laid down in the Basic Law. It follows that the right of refusal to testify can be claimed by Protestant and Catholic clergymen alike."

[Report : *SJZ*, 5 (1950), 826.]

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

v.—Conquest

Territory—Subjugation—Annexation—Effect upon Treaties.

See Case No. 95 (*Security for Costs (Switzerland) Case*).

III.—Loss of Territorial Sovereignty

Territory—Loss of—Renunciation of Territory pending Final Settlement—Treaty of Peace between Italy and the United Nations of February 10, 1947—Eritrea.

See Case No. 24 (*Sorkis* v. *Amed*).

VII.—Sovereignty over the Air

Case No. 30 **Air Law—Scheduled International Services—Restriction to Statutory Corporations—Private Company Prohibited from Landing Aircraft—Feeder Services by Charter Plane Arranged by Travel Agency—Liability of Travel Agency for Aiding and Abetting Operation of Prohibited Services—Civil Aviation Act, 1946.**

ACKROYDS AIR TRAVEL, LTD. *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

England, High Court of Justice, King's Bench Division.
(Lord Goddard C.J.; Humphreys and Jones JJ.)
March 28, 1950.

THE FACTS.—This was a case stated by the Chief Metropolitan Magistrate. The respondent, the Director of Public Prosecutions, had laid information against the appellants, charging them that they did unlawfully carry passengers by air for reward on a scheduled journey between Croydon Airport and Le Bourget, contrary to the Civil Aviation Act, 1946, s. 23 (1). The appellants, a travel agency, were a limited company carrying on business in London. They made bookings for passengers travelling by air, but they did not themselves own either aircraft or land transport.

A South African company, called Mercury Airways, Ltd., had until September 1948 operated an airline between the United Kingdom and South Africa, but an Order in Council of that month prohibited the company from carrying passengers from the United Kingdom; accordingly they had ceased to operate from the United Kingdom but had continued to provide a regular service between Paris and South Africa. Travel agencies in London, among them the appellants, made bookings for this service and remitted the bookings to Mercury Airways. An oral agreement was made between the representatives of the appellants and of Mercury Airways by which the appellants further undertook, if and when required, to arrange for the conveyance of passengers by charter aircraft between Croydon and Le Bourget in readiness for the flight on which they were booked for South Africa. In pursuance of this scheme the appellants had on fourteen different dates chartered aircraft from three aircraft companies other than the three corporations set up under the Civil Aviation Act, 1946, and between September 26 and November 20, 1948, thirty-one flights took place. On other occasions, Mercury Airways had chartered the planes direct, the cost of the charter being paid by the appellants to the aircraft company concerned. No charge was made to the passengers for the journey between London and Paris. The aircraft were manned and flown only by employees of the aircraft company concerned. No specific aircraft was ever held at the disposal of the appellants. Only such passengers were carried under the arrangement as had been accepted by Mercury Airways, Ltd., as passengers for a flight between Paris and South Africa.

The Chief Metropolitan Magistrate, in his statement of the case, said:

"It was contended on behalf of the appellants that (i) the appellants were not carriers of passengers by air for hire or reward within the meaning of s. 23 (1) of the Civil Aviation Act, 1946; (ii) none of the journeys was a scheduled journey within the meaning of s. 23 (2) of the Act; (iii) none of the said journeys was operated in such a manner that the benefit thereof was available to members of the public; (iv) the appellants did not aid or abet any of the offences alleged in the information because there was no principal offender. It was contended on behalf of the respondent that (i) the appellants had carried passengers by air within the meaning of s. 23 (1) and (2) because (*a*) each of the journeys undertaken had been arranged and organised by the appellants pursuant to an oral agreement between the appellants and Mercury Airways, Ltd.; (*b*) the appellants had included a profit to themselves in the charges made by them to Mercury Airways,

Case No. 30 *Contd.*

Ltd., in respect of such journeys; (*c*) each of such journeys was one of a series of journeys undertaken between the same two places which together amounted to a systematic service within the meaning of s. 23 (2); (ii) alternatively, if the appellants had not themselves carried the passengers, they had nevertheless aided and abetted the carriage of them on a scheduled journey by the aircraft companies concerned, and so were properly charged and could be considered as principal offenders by virtue of the Summary Jurisdiction Act, 1884, s. 5.

"The magistrate, being of the opinion that (*a*) the appellants were not themselves carriers of passengers, but had aided and abetted the carriage by air of passengers by the three aircraft companies; (*b*) the appellants did so for reward; (*c*) the aircraft companies, although not acting in concert, were together operating a series of journeys which amounted in the aggregate to a schedule; (*d*) the appellants were aiding and abetting, although no one of the three aircraft companies was necessarily by itself operating a scheduled series of journeys, found the appellants guilty of the charges."

Held: that there was evidence on which the magistrate could properly find that scheduled journeys had been undertaken contrary to the Civil Aviation Act, 1946, and that the appellants had aided and abetted the offence.

Per Lord Goddard C.J.: "This is a Case stated by the Chief Magistrate sitting at Bow Street Magistrate's Court, before whom the appellants were summoned for unlawfully carrying passengers for hire or reward on a scheduled journey between two places, one of which was in the United Kingdom (namely, Croydon Airport), and Le Bourget. The learned magistrate found that, although the appellants were not themselves carriers of passengers by air, they had aided and abetted the commission of an offence against the Civil Aviation Act, 1946, s. 23 (*Wessel* v. *Carter Paterson and Pickfords Carriers, Ltd.*, [1947] 2 All E.R. 280; [1947] L.J.R. 1370; 111 J.P. 474; *sub nom., Carter Paterson and Pickfords Carriers, Ltd.* v. *Wessel*, [1947] K.B. 849; 177 L.T. 448; 2nd Digest Supp.), and, relying on the Summary Jurisdiction Act, 1848, s. 5, he convicted them. Section 5 of the Act of 1848 provides:

> '. . . Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender. . . .'

So, if the magistrate was right in holding that the appellants had aided and abetted an offence, he was right in convicting them as he did.

" The proceedings were taken under the Civil Aviation Act, 1946, s. 23, which provides :

> ' (1) Subject to the provisions of this section, it shall not be lawful for any person, other than the three corporations [*i.e.*, the British European Airways Corporation, the British South American Airways Corporation, and the British Overseas Airways Corporation], their associates, and the servants and agents of the three corporations and their associates, to carry passengers or goods by air for hire or reward upon any scheduled journey between two places of which at least one is in the United Kingdom. (2) In this Act the expression " scheduled journey " means one of a series of journeys which are undertaken between the same two places and which together amount to a systematic service operated in such a manner that the benefits thereof are available to members of the public from time to time seeking to take advantage of it.'

Mercury Airways, Ltd., a company registered in South Africa, ran a service for air passengers between Cape Town and this country. For reasons which are not stated, and which are immaterial, an Order in Council was made which prohibited Mercury Airways, Ltd., from landing their aircraft in this country. Accordingly, they terminated their flights at Paris. Then they arranged with the appellants to have transported to Paris passengers in the United Kingdom who wished to travel by the Mercury Airways, Ltd., and who changed at Paris into aeroplanes belonging to Mercury Airways, Ltd. Mercury Airways, Ltd., were thereby enabled to run a service between this country and South Africa, although they were prohibited from themselves landing their aeroplanes at an airport in this country.

" The Case finds that Mercury Airways, Ltd., from its office, which was in London, and

> ' by means of divers agents, of whom the appellants were one, booked reservations for passengers on aircraft operating . . . between Paris and South Africa ',

and that the appellants, having booked such passengers, remitted the bookings to the company at their office. It is found that on or about Sept. 26, 1948, an agreement was made verbally between the managing director of the appellant company and a representative of Mercury Airways, Ltd., that the appellants

> ' should, if and when required by the said company to do so, arrange for the conveyance from London to Paris of such of the company's passengers as desired to be in Paris in readiness for the flight upon which they were booked to

Case No. 30 Contd.

> proceed thence to South Africa. From time to time thereafter between Sept. 26 and Nov. 20, 1948, the company requested the appellants to arrange for the charter of aircraft for the conveyance to Le Bourget airport of such passengers and to hire a coach to transport such passengers from London to Croydon and to arrange for the necessary catering and baggage-handling facilities.'

The Case then sets out the various flights which were undertaken by three aircraft companies, which shows that whenever anyone wanted to go by a Mercury aircraft to South Africa there was an aeroplane at his disposal in this country to take him to Le Bourget where he would board the South African aeroplane.

" It is enough for this court to say that they are satisfied that there was evidence on which the magistrate could properly find that there were in this case scheduled journeys undertaken by persons other than the three corporations which are named in the statute. The journeys, in the opinion of the court, were enough to justify the magistrate in holding that there was a systematic service operated in such a manner that the benefits thereof were available to members of the public or such members of the public as desired to fly to South Africa. It is true that the magistrate has found that the offence was committed against s. 23, and that, whoever committed the offence, whether it was Mercury Airways, Ltd., or whether it was the aircraft companies, the appellants had aided and abetted the commission of that offence, because it is quite clear that they knew about it.

" In *Wessel* v. *Carter Paterson and Pickfords Carriers, Ltd.* (*Wessel* v. *Carter Paterson and Pickfords Carriers, Ltd.*, [1947] 2 All E.R. 280 ; [1947] L.J.R. 1370 ; 111 J.P. 474 ; *sub nom.*, *Carter Paterson and Pickfords Carriers, Ltd.* v. *Wessel*, [1947] K.B. 849 ; 177 L.T. 448 ; 2nd Digest Supp.), this court said that a person could only be convicted—apart from some special exceptions—as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted an offence and he helped in the actions which constituted the offence, that was enough to convict him of being an aider and abettor. In this case, there cannot be any doubt that the appellants, who themselves made all these arrangements, knew all the necessary circumstances. The circumstances point to the fact that there was here a system, and a system which amounted to scheduled journeys. Therefore, as the appellants knew all the circumstances relating to it, in our opinion, there was ample evidence on which the magistrate could convict of aiding and abetting. For these reasons, this appeal must be dismissed."

Per Humphreys J.: "I agree. I think it is probable that the framers of s. 23 did not envisage a case being brought against travel agents. In my opinion, however, the words of the section are wide enough to cover the facts of this case. I also agree that, in order that a person may be convicted as an aider and abettor of an offence punishable by summary conviction, it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful."

[Reports: [1950] 1 All E.R. 933; 48 L.J.R. 398; 83 Ll.L. Rep. 431.]

NOTE.—S. 23 of the Civil Aviation Act, 1946, has now been replaced by the similar terms of s. 24 of the Air Corporations Act, 1949.

Air Law—Régime Within and Over the Air—Offences Committed on Board Aircraft over the High Seas.

See Case No. 47 (*United States* v. *Cordova et al.*).

B—PARTS OF STATE TERRITORY

II.—Rivers

iii.—International Rivers

International Rivers—Freedom of Navigation—Navigation on the Rhine—Convention of Mannheim, 1868—Jurisdiction in Cases of Collision on the Rhine—Special Rhine Shipping Tribunals—Effects of Denunciation by Germany of Mannheim Convention in 1936—Effects of Allied Occupation of Germany on Normal Operation of Legal Rhine Shipping Régime. **Case No. 31**

THE MAAS.

Holland, District Court of Dordrecht. April 19, 1950.

THE FACTS.—This case arose out of a collision between two Dutch ships, the *Maas* and the *Geulle*, on October 25, 1948, in the mouth of the Ruhr near Duisburg-Ruhrort on the Rhine. The owner of the *Maas* sued the owner of the *Geulle* in the District Court of Dordrecht. The defendant disputed the Court's jurisdiction, on the ground that the special Rhine Shipping Tribunals had exclusive jurisdiction in such cases. These Tribunals were set up under the Convention of

Case No. 31 *Contd.*

Mannheim of October 17, 1868, Articles 32–36 of which provided for the designation by the riparian States of Special Rhine Shipping Tribunals having jurisdiction in cases of damage caused by collisions on the Rhine within their respective districts. Such Tribunals were designated in Holland by a Law of July 16, 1869 (*Staatsblad* No. 139), Article 1. In Germany a Law of September 5, 1935 (*Reichsgesetzblatt*, I, p. 1152), referred cases such as the present to the Amtsgericht of Duisburg-Ruhrort.

The alteration made in the Convention of Mannheim by the Treaty of Versailles of 1919 left the rules concerning the special Rhine Shipping Tribunals untouched. In a Note dated November 14, 1936, the German Government declared that they no longer recognized as binding the provisions of the Treaty of Versailles dealing with German waterways and the international river conventions based thereon. The intention of the declaration was to set aside the Convention of Mannheim and, by a Law of January 30, 1937, the Law of September 5, 1935.

In 1945 there occurred the unconditional surrender of Germany and the assumption of supreme authority by the four major Allied Powers, all of whom enacted ordinances relating to navigation on the Rhine in their respective zones. British Military Government Ordinance No. 65, for example, which came into operation on December 31, 1946, reconstituted the Rheinschiffahrtsgerichte and the Rheinschiffahrtsobergerichte in the form in which they had existed before November 14, 1936, subject, however, to certain restrictions in Article III; see also Control Council Law No. 4, Article III, and Military Government Law No. 4, Article VI, para. 10 (as amended April 16, 1946). These provisions excluded from the jurisdiction of the reconstituted Tribunals "contentious civil cases in which any national of the United Nations . . . is a defendant, or being a plaintiff is made defendant to a counterclaim . . ." etc. Some of the restrictions on the jurisdiction of the Tribunals were removed by Law No. 13 of the Council of High Commissioners, made on November 25, 1949, and which came into effect on January 1, 1950.

Held: that the District Court had jurisdiction. The Rhine Shipping Tribunals were not at the date of the commencement of the proceedings available to the plaintiff. The Court traced the history of the various enactments governing jurisdiction in cases of collisions between vessels on the Rhine and pointed out that, when the Rhine Shipping Tribunals were set up, the normal jurisdiction of Dutch courts under Article 543 of the Netherlands Commercial Code was ousted.[1] That was the position up to the German Law of 1937 abolishing the Rhine Shipping Tribunals. Thereafter the Dutch courts regained their jurisdiction under Article 543 of the Commercial

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[1] Cf. *The Meeuw* v. *The Echo*, decided on April 6, 1938: *N.J.*, 1939, No. 483.

Code. None of the Ordinances of the Allied Powers after 1945 restored the jurisdiction of the Rhine Shipping Tribunals in cases arising out of circumstances such as the present, which fell into the category excluded by Article III of British Military Government Ordinance No. 65.

The summons in this case was issued on September 16, 1949, before Law No. 13 came into operation. The legal position on that date was therefore as follows: Assuming (i) that the Convention of Mannheim was not suspended by the state of war which still existed[1] between Germany and Holland, (ii) that the Allied occupation authorities were competent to enact the various ordinances referred to above, and (iii) that the Netherlands court in arriving at a decision whether or not it had jurisdiction in a case such as the present must take notice of those ordinances, the District Court of Dordrecht had, and the Rhine Shipping Tribunals did not have, jurisdiction.

[Report: *N.J.*, 1951, No. 144.]

Note.—Cf. the case of *The Clemence*, decided by the District Court of Rotterdam on November 21, 1950, which arose out of a collision between a Belgian and a Dutch vessel on September 13, 1946, on the Rhine in the French Zone of Occupation. The proceedings were commenced on June 5, 1948, and the defence successfully pleaded that the action had become statute-barred on January 1, 1948, under paragraphs 117/118 of the German *Binnenschiffahrtsgesetz* (Inland Navigation Law). Article 10 of Control Council Law No. 13 of the Council of Allied High Commissioners, dated November 25, 1949, provided that the time during which German courts had no jurisdiction as a result of enactments of the Occupying Powers, should not count in the computation of time for periods of limitation. The plaintiffs sought to argue from this that time did not run against them until the reconstitution on January 1, 1947, of the Rhine Shipping Tribunals (in the French Zone by Ordinance No. 73 of December 6, 1946). The Court held that the plaintiffs had failed to show that prior to that date no German court had jurisdiction in the case. Moreover, the claim could, in view of the German denunciation in 1936 of the Convention of Mannheim, and the absence of German Rhine Shipping Tribunals, have been brought before the ordinary Netherlands courts. [Report: *N.J.*, 1952, No. 185.]

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[1] From the point of view of international law, the state of war between Germany and Holland ceased to exist in 1945 (cf. *In re Flesche: Annual Digest*, 1949, Case No. 87). The Court must have been referring to the continuance in force of certain Dutch emergency regulations, which were only revoked by a Law of July 20, 1951 (*Staatsblad*, No. 311).

III (A).—The Continental Shelf

Case No. 32 **State Territory—Continental Shelf and Marginal Sea Adjacent to Territorial Waters—Sea Bed and Subsoil off Coast—Claim by Texas to State Boundary Twenty-Four Miles Beyond Territorial Belt—Conflicting Claims by United States and Texas over Area as Extended—Whether *Dominium* and *Imperium* Separable—Interpretation of Terms " on an equal footing with existing States " of Resolution Annexing Texas to Union.**

UNITED STATES *v.* TEXAS.

United States, Supreme Court.

(Vinson C.J. ; Black, Reed, Frankfurter, Douglas, Burton, Minton JJ.)

June 5, 1950.

THE FACTS.—In 1941 Texas extended her state boundary to a line in the Gulf of Mexico which was 24 miles beyond the limit of the three-mile territorial belt, and in 1947 she extended the boundary to the outer edge of the continental shelf. In the purported exercise of her right of ownership over the area as so extended Texas granted leases to a number of persons to exploit the resources of the sea bed and the subsoil. The Government of the United States thereupon instituted proceedings against Texas for a declaration that the rights of the United States over the area concerned were paramount as against Texas, and for ancillary relief. Texas contended, *inter alia*, that prior to her annexation by the United States she had *dominium* as well as *imperium* over all lands and minerals underlying the marginal sea and that, although she had transferred her *imperium* when entering the Union, she had never transferred her *dominium* over the disputed area to the United States. The United States contended, *inter alia,* that the wording of the Joint Resolution of March 1, 1845, annexing Texas to the Union, which provided that Texas was to retain " all the vacant and unappropriated lands lying within its limits ", was not such as to include the marginal sea now claimed by Texas.

Held (*per Curiam,* Reed, Frankfurter and Minton JJ. dissenting) :

(i) that even if Texas had both *dominium* and *imperium* in and over the marginal belt when she existed as an independent Republic, any claim she may have had was relinquished when Texas was admitted to the Union " on an equal footing with the existing States " pursuant to the Joint Resolution of March 1, 1845 ;

(ii) that, although *dominium* and *imperium* are normally separable and separate, in this instance property interests were so subordinated to the rights of sovereignty as to follow the latter ;

(iii) that, consequently, the rights of the United States were paramount as against Texas, and that the United States Government was entitled to the relief claimed. The Court said :

" The Republic of Texas was proclaimed by a convention on March 2, 1836. The United States and other nations formally recognized it. The Congress of Texas on December 19, 1836, passed an act defining the boundaries of the Republic. The southern boundary was described as follows : ' beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande '. Texas was admitted to the Union in 1845 ' on an equal footing with the original States in all respects whatever '. Texas claims that during the period from 1836 to 1845 she had brought this marginal belt into her territory and subjected it to her domestic law which recognized ownership in minerals under coastal waters. This the United States contests. Texas also claims that under international law, as it had evolved by the 1840's, the Republic of Texas as a sovereign nation became the owner of the bed and sub-soil of the marginal sea *vis-à-vis* other nations. Texas claims that the Republic of Texas acquired during that period the same interest in its marginal sea as the United States acquired in the marginal sea off California when it purchased from Mexico in 1848 the territory from which California was later formed. This the United States contests.

" The Joint Resolution annexing Texas provided in part :

> ' Said State, when admitted into the Union, after ceding to the United States, *all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence* belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic ; and shall also retain *all the vacant and unappropriated lands lying within its limits,* to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct ; but in no event are said debts and liabilities to become a charge upon the Government of the United States.' [Italics added.]

" The United States contends that the inclusion of fortifications, barracks, ports and harbors, navy and navy-yards, and docks in the cession clause of the Resolution demonstrates an intent to convey all interests of the Republic in the marginal sea, since most of these properties lie side by side with, and shade into, the marginal sea. It stresses the phrase in the

Case No. 32 *Contd.*

Resolution ' other property and means pertaining to the public defence '. It argues that possession by the United States in the lands underlying the marginal sea is a defense necessity. Texas maintains that the construction of the Resolution both by the United States and Texas has been restricted to properties which the Republic actually used at the time in the public defense.

" The United States contends that the ' vacant and unappropriated lands ' which by the Resolution were retained by Texas do not include the marginal belt. It argues that the purpose of the clause, the circumstances of its inclusion, and the meaning of the words in Texas and federal usage give them a more restricted meaning. Texas replies that since the United States refused to assume the liabilities of the Republic, it was to have no claim to the assets of the Republic except the defense properties expressly ceded.

" In the *California* case, neither party suggested the necessity for the introduction of evidence. 322 U.S. 24. But Texas makes an earnest plea to be heard on the facts as they bear on the circumstances of her history which, she says, sets her apart from the other States on this issue.

" The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts. *United States* v. *Texas*, 162 U.S. 1 ; *Kansas* v. *Colorado*, 185 U.S. 125, 144, 145, 147 ; *Oklahoma* v. *Texas*, 253 U.S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential.

" We conclude, however, that no such hearing is required in this case. We are of the view that the ' equal footing ' clause of the Joint Resolution admitting Texas to the Union disposes of the present phase of the controversy.

" The ' equal footing ' clause has long been held to refer to political rights and to sovereignty. See *Stearns* v. *Minnesota*, 179 U.S. 223, 245. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government ; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns* v. *Minnesota*, *supra*, pp. 243–245. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

" Yet the ' equal footing ' clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores, of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves. See *Pollard's Lessee* v. *Hagan*, 3 How. 212, 228–229; *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Harbor Comm'rs*, 18 Wall. 57, 65–66; *Knight* v. *U.S. Land Assn.*, 142 U.S. 161, 183; *Shively* v. *Bowlby*, 152 U.S. 1, 26; *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404. The theory of these decisions was aptly summarized by Mr. Justice Stone speaking for the Court in *United States* v. *Oregon*, 295 U.S. 1, 14 as follows:

> ' Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York* 271 U.S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'

" The ' equal footing ' clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an ' equal footing ' with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for

Case No. 32 *Contd.*

the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.

"We stated the reasons for this in *United States* v. *California, supra*, p. 35, as follows :

> 'The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. See *United States* v. *Belmont*, 301 U.S. 324, 331–332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.'

And so although *dominium* and *imperium* are normally separable and separate, this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.

"It is said that there is no necessity for it—that the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet, as pointed out in *United States* v. *California*, once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the *California* decision, which we have applied to Louisiana's case.[1] The same result must be reached here if 'equal footing' with the various States is to be achieved. Unless any claim or title which the Republic of Texas had to the marginal sea

[1] See *infra*, Case No. 33.

is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States* v. *California*, *supra*, pp. 32–32) nor California nor Louisiana enjoys such an advantage. The ‘ equal footing ’ clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee* v. *Hagan*, *supra*) which would produce inequality among the States. For equality of States means that they are not ‘ less or greater, or different in dignity or power ’. See *Coyle* v. *Smith*, 221 U.S. 559, 566. There is no need to take evidence to establish that meaning of ‘ equal footing ’.

“ Texas in 1941 sought to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit and asserted ownership of the bed within that area. And in 1947 she put the extended boundary to the outer edge of the continental shelf. The irrelevancy of these acts to the issue before us has been adequately demonstrated in *United States* v. *Louisiana*. The other contentions of Texas need not be detailed. They have been foreclosed by *United States* v. *California* and *United States* v. *Louisiana*.

“ The motions of Texas for an order to take depositions and for the appointment of a Special Master are denied. The motion of the United States for judgment is granted. The parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect.

“ So ordered.”

[Report : 339 U.S. 707.]

State Territory—Continental Shelf and Marginal Sea Adjacent to Territorial Waters—Sea Bed and Subsoil off Coast of Louisiana—Louisiana Statute Fixing State Boundary Twenty-Seven Miles Seaward from Shore—Conflicting Claims by United States Government and Louisiana to Territorial Belt and Extended Marginal Sea. **Case No. 33**

UNITED STATES *v.* LOUISIANA.

United States, Supreme Court.

(Vinson C.J. ; Black, Reed, Frankfurter, Douglas, Burton, Minton, JJ.)

June 5, 1950.

THE FACTS.—By a statute enacted in 1938 Louisiana declared its southern boundary to be 27 marine miles from the shore line, and accordingly asserted the right, as against the Government of the United States, to be entitled to an area under the Gulf of Mexico which extended 27 miles seaward from the shore. In the purported exercise of that right Louisiana granted leases to a number of persons to exploit the resources of the sea bed and sub-soil within that area. The Government of the United States instituted proceedings against Louisiana for a declaration that the rights of the United States over the area concerned were paramount as against Louisiana, and for ancillary relief. It was contended on behalf of the United States that as the three-mile belt off the shore is in the domain of the nation rather than of separate States, it followed *a fortiori* that the area claimed by Louisiana must likewise belong to the nation. Louisiana contended that since her admission into the Union in 1812 she had exercised continuous and undisturbed sovereignty and possession over the disputed area and that she was entitled to continue to do so.

Held (*per Curiam*, Frankfurter J. dissenting): that the claim of Louisiana to ownership of the marginal sea was no stronger than that of the original Colonies prior to their admission to the Union, that the marginal sea was a national concern and not a state concern, and that the United States Government was entitled to the relief claimed. The Court said:

" The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

" That is the rationale of *United States* v. *California*, 332 U.S. 19. It is fully elaborated in the opinion of the Court in that case and does not need repetition.

" We have carefully considered the extended and able argument of Louisiana in all its aspects and have found no reason why Louisiana stands on a better footing than California so far as the three-mile belt is concerned. The national interest in that belt is as great off the shore line of Louisiana as it is off the shore line of California. And there are no material differences in the preadmission or postadmission history of Louisiana that make her case stronger than California's. Louisiana prior to admission had no stronger claim to ownership of the marginal sea than the original thirteen colonies or California had. Moreover, the national dominion in the three-mile belt has not been sacrificed or ceded away in either case. The United States, acting through its Attorney General, who has authority to assert claims of this character and to invoke our jurisdiction in a federal-state controversy (*United States* v. *California*, pp. 26–29), now claims its paramount rights in this domain.

" There is one difference, however, between Louisiana's claim and California's. The latter claimed rights in the three-mile belt. Louisiana claims rights twenty-four miles seaward of the three-mile belt. We need note only briefly this difference. We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis-à-vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem. If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the Ocean and the resources of the soil under that area, including oil.

" Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an equity action for an injunction and accounting. The Seventh Amendment and the statute, assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. See *Shields* v. *Thomas*, 18 How. 253, 262 ; *Barton* v. *Barbour*, 104 U.S. 126, 133–134.

" We hold that the United States is entitled to the relief prayed for. The parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect.

" So ordered."

[Report : 339 U.S. 699.]

VII.—International Canals

International Waterways—Kiel Canal—Jurisdiction in the Matter of Collisions—Substantive Law Applicable—Jurisdiction of German Courts. **Case No. 34**

KIEL CANAL COLLISION CASE.

Germany (*British Zone*), *Supreme Court. June* 1, 1950.

THE FACTS.—On August 15, 1942, a Norwegian vessel collided with a Danish vessel in the Kiel Canal. The Norwegian vessel was sunk as a result of the collision and the owners thereupon brought an action for damages against the owners of the Danish vessel. On behalf of the defendants it was contended, *inter alia*, that the Kiel Canal was an international

Case No. 34 ***Contd.*** waterway and that a collision occurring therein must be treated as a collision on the high seas, with the result that the German courts were not competent to adjudicate between the parties.

Held : (i) that, although by virtue of Articles 380 *et seq.* of the Treaty of Versailles the Kiel Canal must be regarded as an international waterway open to the vessels of all nations at peace with Germany, the provisions of that treaty did not exclude the competence of the German courts to adjudicate between the owners of vessels colliding therein.

(ii) that, as the collision had taken place in German territory, German law must be applied. The Court said :

" The appellants contend, unsuccessfully, that the Kaiser-Wilhelm Canal (Kiel Canal) is an international waterway and as such, in so far as concerns the law to be applied, the same as the high seas. It is true that the Kiel Canal was internationalised by Articles 380 *et seq.* of the Treaty of Versailles, with the result that it was to be maintained permanently free and open to the vessels of war and of commerce of all nations at peace with Germany on terms of entire equality. Whether the Canal has remained an international waterway, as the appellants contend, seems doubtful because the German Note on German waterways, of November 14, 1936, put an end to internationalisation, at least *de facto*, and this step did not meet with any serious resistance on the part of the signatory Powers of the Treaty of Versailles. This question, however, need not be decided because the conclusion which the appellants draw in their favour from the internationalisation of the Canal, namely that a collision in the Canal has to be treated like a collision on the high seas, is not justified.

" The true characteristic of an international waterway is freedom of navigation. It implies a limitation of the territorial sovereignty of the riparian State, a kind of State servitude in so far as the freedom of navigation requires the same. Unless express rules of international law have provided for a more far-reaching limitation of territorial sovereignty, freedom of navigation on international waterways does not by any means imply a limitation of the power of jurisdiction and the field of application of the local system of law. The view for which the appellants contend, namely, that the legal consequences normally resulting from an entry into foreign territory do not, in principle, affect the person using an international waterway goes too far in the generality in which it is expressed. It is true that the territorial sovereignty of the riparian State suffers considerable limitations as a result of the internationalisation of a waterway, but these limitations are suffered only within the framework of the true purpose of internationalisation, i.e. general freedom of navigation. The assumption of the appellants that freedom of navigation, like any other freedom, has to be interpreted extensively, is arbitrary and certainly not in conformity with the provisions of the Treaty of Versailles concerning the Kiel Canal. The restrictions upon German territorial sovereignty in favour of all nations at peace with Germany, which are contained in Articles 380 *et seq.* of the Treaty of Versailles, are concerned only with uninterrupted traffic in the Canal. The exercise of German jurisdictional power and the application of German law in the Canal zone, however, cannot be interpreted as a restriction of traffic. The Treaty of Versailles only encroaches upon the use of the Canal, but not upon the legal relations resulting from such user as that between the parties concerned ; these relations are not necessarily connected with such user, but they can arise only as result thereof. Moreover, the provisions of the Treaty of Versailles itself provide that German territorial sovereignty is to be preserved in certain respects, particularly with regard to police and customs regulations. . . . It can hardly be assumed that a vessel which sails through the Kiel Canal is to be subject to the security measures and German customs authority applicable to this Canal, but is in all other respects to be exempt from German law and German jurisdiction. Article 381 (1) of the Treaty of Versailles makes it clear that the nationals, goods, vessels and boats of all nations when using the Canal are to be treated on a footing of complete equality with German nationals. This equality would be lacking if foreign users of the Canal were not to be subject to German jurisdiction and German law.

" Having regard to the fact that, in view of what has been said, the contention of the appellants that a collision between the vessels of the parties must be treated in law as if it had occurred on the high seas does not prevail, the question as to the law which would have been applicable in such a case can remain undecided. The case before us provides no reason to depart from the rule that a collision between vessels in territory under German sovereignty must be judged according to German law. . . ."

[Report : *OGHZ*, IV (1950), p. 194.]

International Canals—Suez Canal—Convention of 1888—Exercise of Belligerent Rights by Egypt.

See Case No. 149 (*The Flying Trader*).

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

ii.—Criminal Jurisdiction over Aliens

Case No. 35 **Jurisdiction—Criminal Jurisdiction over Aliens—Crimes Committed Abroad—Crimes against the Safety of the State.**

NUSSELEIN *v.* BELGIAN STATE.

Belgium, Court of Cassation, 2nd Chamber. February 27, 1950.

THE FACTS.—This was an appeal from a decision of November 16, 1949, of the Military Court of Appeal, at Brussels, convicting the appellant of having given aid and assistance to the enemy, in Belgium and elsewhere, in violation of Article 115 of the Belgian Penal Code. It was contended on behalf of the appellant that he was a Netherlands soldier and that the Belgian criminal courts accordingly had no jurisdiction over him.

Held : that the appeal must be rejected. The Belgian courts had jurisdiction to try foreign soldiers for crimes against the safety of the State committed in Belgium or abroad. The Court said :

" The appellant was charged with offences against Article 115, paragraph 2, of the Penal Code (as amended by the law of 25 May 1945, Article 1) committed at Ghent or elsewhere in the territory of the Kingdom, or outside that territory, between 10 May 1940 and September 1944. Offences against Article 115 constitute crimes against the external safety of the State. Article 10 of the law of 17 April 1878 (law of 18 July 1934) provides that an alien who commits a crime or delict against the safety of the State outside the territory of the Kingdom may be tried in Belgium. Article 3 of the Penal Code provides that offences committed in the territory of the Kingdom by Belgian nationals or by aliens shall be punished in accordance with the provisions of Belgian law. No legal provision concerning offences of this kind draws a distinction between foreign soldiers and civilians."

[Report : *Pasicrisie belge,* 1950, I, 448.]

Jurisdiction—Over Aliens for Crimes Committed Abroad—Bigamy Committed by Foreigner Abroad—Principle of Constructive Nationality of Offender. **Case No. 36**

PUBLIC PROSECUTOR *v.* J. S. R.

Holland, District Court of The Hague. May 13, 1949.

Court of Appeal of The Hague. December 23, 1949.

Supreme Court (*on appeal*). *June* 20, 1950.

THE FACTS.—In January 1946 an Englishwoman, J. S. R., who had already married an Englishman, went through a form of marriage in England with a Dutch subject, V., and subsequently lived with him in Holland. She was later prosecuted in Holland for bigamy under Article 5 of the Dutch Criminal Code concerning the applicability of Dutch penal law to offences committed by foreigners abroad. Article 5 provides as follows :

> " The Netherlands Criminal Code applies to a Netherlander who, outside the Kingdom in Europe, commits :
>
> " 1. One of the crimes defined in Titles I and II of Book II . . . [*inter alia*] Article 237 (bigamy) . . .
>
> " 2. An act which is a crime under the Netherlands Criminal Code and to which a penalty is also attached by the law of the country where it was committed.
>
> " A person who becomes a Netherlander only after the commission of the act may also be prosecuted."

The District (Police) Court of The Hague convicted the woman. On appeal,

Held (by the Court of Appeal) : that the conviction must be quashed. The Dutch courts had no jurisdiction in this case. Article 5 of the Criminal Code applied only to offenders who had become Netherlands nationals *after* the offence, whereas in the case under consideration the offence was committed simultaneously with the acquisition of Dutch nationality by the woman, since it was precisely her bigamous marriage which brought about her acquisition of Dutch nationality.

Since no appeal lay from this decision, the prosecution was finally abandoned. The Public Prosecutor, however, took the case to the Supreme Court " in the interests of the law ", as an extraordinary means of testing the judgment of the Court of Appeal—a course which would not affect the acquittal of the accused.

Held (by the Supreme Court) : that the Netherlands Criminal Code applied to the offence committed by the accused.

Case No. 36 *Contd.* It followed from the provision of Article 5, subsection 2, that with regard to facts to which this provision applied, Dutch criminal law was applicable to a foreign-born woman not only if she was a Netherlands subject at the moment when she committed the offence but also if she became a Netherlands subject only after its commission. The Court of Appeal was wrong in holding that there was a third case, in which the provision would not apply, viz., where the woman acquired Netherlands nationality by the commission of the offence.

[Report : *N.J.*, 1950, No. 646.]

Case No. 37 **Jurisdiction—Territoriality of—Criminal Offence Initiated Abroad—Offence Effective in Country of Venue—Jurisdiction of Country of Venue.**

DIRECTOR OF PROSECUTIONS *v.* HOBBS.

Germany (*British Zone*), *Control Commission Court of Appeal.*

(Inglis C.J. ; Rogers and Blagden JJ.)

April 27, 1950.

THE FACTS.—The respondent, a United Kingdom national in the employ of the British Control Commission in Germany, arranged with relatives in the United Kingdom for parcels containing coffee to be sent to him at the Control Commission Post Office in Germany at which he was employed. The act of causing coffee to be transported across the German frontier being a criminal offence by virtue of section 5 (*b*) of Ordinance 176 (as amended),[1] the respondent was charged with a series of offences under that section. The respondent's contention that the offences, if any, had been committed in England and were therefore outside the jurisdiction of the Control Commission Court in Germany was upheld by the Magistrate, and the Director of Prosecutions now appealed.

Held : that the offences, although initiated outside the jurisdiction, had taken effect within the jurisdiction, and that this was sufficient to found the jurisdiction of the Control Commission Court ; that, accordingly, the case would be sent back to the Magistrate to reconsider his decision in the light of the judgment of the Court. The Court said (*per* Rogers J.) :

" The respondent was charged with twenty-six offences, framed under Section 5 (*b*) of Ordinance 176 (1), in that he an official British civilian unlawfully caused property to be transported across the Frontiers of Germany. It was alleged that a total of 26 parcels containing coffee were posted in England by relatives of the Respondent, all addressed to fictitious persons 'care of Intelligence Division' of the Control Commission at Herford. The Respondent was employed in the Post Office of that Division, and was in a position to obtain possession of the parcels when they arrived. In a written statement to the Police, he had admitted having 'got in touch with relatives in England'. It was contended by the Defence that the phrase 'got in touch with relatives in England' could be read either as meaning that the Respondent got in touch with relatives who were in England, or that he got in touch with relatives when he was in England, and that in either case the acts were done outside the jurisdiction of the Control Commission Courts. To this argument the Prosecution replied that it was not material where the arrangements were made for the coffee to be posted; it was posted to the British zone of Germany at the Respondent's instigation; his acts took effect in the British zone; he himself was within the jurisdiction of the Court; therefore the case was properly triable by the Court. The Magistrate held that the Prosecution had not proved that the Respondent had done any act in the British zone of Germany which caused the coffee to be transported across the frontiers, and that he was therefore not guilty of any of the charges.

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[1] Section 5 (*b*) of Ordinance 176 (as amended) provides as follows : " No official British civilian otherwise than in the course of his official duties or with the authority of Military Government shall transport or cause to be transported across the Frontiers of Germany whether by land, sea or air, any property except personal and household effects (including motor vehicles) and any property he has lawfully acquired in Germany ".

"It is an established principle, recognised by the Courts of many countries, including those of England, France and the United States, that a person who initiates from outside the jurisdiction of the Court acts which take effect within the jurisdiction, is liable to prosecution in the place where the acts take effect. The classic illustration in the text books is the case of a man who fires a gun across a frontier, and kills another man in a neighbouring State. In the leading English case of *R.* v. *Oliphant* (1905) 2 K.B. 67, the English Court of Crown Cases Reserved upheld the conviction of the manager of the Paris branch of a London firm, who had falsified accounts in Paris with intent to defraud his employers in London, and had been tried and convicted by the Central Criminal Court in London. It was held that that Court had jurisdiction as the frauds took effect in London. In the case of *R.* v. *Godfrey* (1923) 1 K.B. 24, on an application for a writ of Habeas Corpus, a Divisional Court of the King's Bench Division declined to interfere with the extradition to Switzerland, for trial by a Swiss Court, of a British subject, on a charge of obtaining goods by false pretences, although the applicant was himself in England at the time at which the false pretences were made, at his instigation, by a business associate of his, and had not visited Switzerland since the time of the offence. This principle was recognised by the Permanent Court of International Justice in the well-known *Lotus case*.

" The charges all alleged that the Respondent caused the coffee to be transported across the Frontiers of Germany ; it was not until the coffee in fact arrived in Germany that the offences were complete. It is implicit in these charges that they could not succeed unless and until the Respondent's acts had taken effect in Germany. At the time when they did take effect, and the coffee was transported across the frontiers and delivered to the accused or someone on his behalf at Herford, he had the status of an official British civilian and was within the jurisdiction. The charges were therefore well-founded.

"There may be some other aspect of some or all of the charges which neither this Court nor the Summary Court has considered. We do not, therefore, propose to remit the case to the Magistrate with an instruction to convict. The case will be sent back to the Magistrate to reconsider his decision in the light of this judgment."

[Report : *C.C. Cr. App. R.*, 1950, p. 86.]

Jurisdiction—Over Aliens for Crimes Committed Abroad—War Crimes—Jurisdiction over Crimes Committed Outside Occupied Territory against Deported Nationals.

See Case No. 125 (*In re Rohrig, Brunner and Heinze*).

vii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(*a*) FOREIGN STATES

[See also Part II, A, II, *Sovereignty and Independence* : iii. *Acts of Sovereignty and Transactions of a Private Character*.]

Case No. 38

Jurisdiction—Immunity from—Foreign States—Waiver of Immunity—Immunity from Execution—Immunity in Respect of Private Law Transactions.

ROBINE *v.* CONSUL OF GREAT BRITAIN.

France, Court of Appeal of Bordeaux. November 3, 1950.

THE FACTS.—The appellant had in 1947 leased a house to the ' British State ' for use as a consulate. On the expiry of the lease he gave notice that it would not be renewed. The British consul thereupon invoked a law of September 1, 1948, which gave sitting tenants a right to the renewal of their lease.

The Court of first instance found in his favour. This was an appeal from that decision. The British consul now entered a plea to the jurisdiction on the ground of his immunity and that of the State in whose name the lease was concluded. It was contended on behalf of the appellant that the immunity had been waived, firstly, by reliance upon French legislation before the Court of first instance, and, secondly, by a provision in the lease to the effect that the lessee elected domicil at his place of residence and the State of Britain at the consulate. Such a provision, it was claimed, must be deemed to imply submission to the jurisdiction of French courts. It was contended, finally, that the conclusion of the lease was a private law transaction in respect of which there was no immunity.

Held : that the Court lacked competence. It was doubtful whether the immunity from jurisdiction could be waived. In any case neither the choice of domicil, nor the acceptance of the jurisdiction of the Court of first instance constituted such a waiver in respect of the present proceedings. No distinction could be drawn between acts of a State in a public law or a private law capacity. The Court said :

" Consular archives are inviolable. It is true that foreign consuls are subject to the jurisdiction of the ordinary courts of the country where they reside, at least in respect of obligations which they contract in their private capacity, and not as representatives of their Government. That is not the case here. Moreover, even in such a case the nature of consular functions requires that a judgment against the consul shall not be executed on the premises where the documents constituting the consular archives are kept, since these can be neither seized nor examined. It is thus clear that a judgment ordering eviction from premises where a foreign consulate functions cannot be executed against the will of the consul, since eviction would include the seizure and ejection into the street of the inviolable consular archives. Robine contends that that consideration relates only to immunity from execution and not to immunity from jurisdiction. However, it shows that the immunity is incompatible with the operative part of the judgment, without which a judicial decision is inconceivable.

" Immunity makes inapplicable the rules of competence *ratione materiae*. The latter concern public policy. Accordingly immunity from jurisdiction is itself a matter for concern from the point of view of public policy. The Court must therefore *ex officio* give judgment in favour of a defaulting foreign State, or of a defaulting foreign consul in his capacity of representative of a foreign State. It cannot be maintained that immunity ceases to concern public policy if the foreign State or consul enters an appearance, or that the State or consul can expressly or impliedly waive the immunity. The British consul could not waive the immunity, either by a choice of

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domicil inserted in the lease, or by failing to invoke the immunity before the Court of first instance.

"Even supposing that the immunity from jurisdiction could be waived, such a waiver must in any case be, if not express, at least absolutely certain and unequivocal. It cannot be implied from a mere choice of domicil inserted in a lease for the purpose of its execution. Firstly, such a choice of domicil only creates a presumption that the parties intended to confer jurisdiction upon the courts of the chosen domicil in respect of a dispute arising, not out of the lease itself, but after its expiry. Moreover, even if the choice of domicil must be regarded as an acceptance of jurisdiction in respect of such disputes, it can nevertheless not in itself be regarded as a final and unreserved waiver, in advance, of the privilege of immunity from jurisdiction in respect of all disputes, without distinction. Since it is implied only, and results from a choice of domicil inserted in a lease concluded by a foreign State for the establishment of a consulate, the tacit waiver of the privilege of immunity from jurisdiction may be considered to have been made only for the purpose of disputes which do not affect the principles of public policy concerning the sovereignty of the foreign State concerned and the peculiar character of the consular functions which were to be exercised on the leased premises.

"In writing to Robine that he should have the equitable rent judicially determined, the British consul certainly accepted the jurisdiction of the French courts, but only for the purpose of determining the rent. This acceptance did not lay him open to an eviction which would be incompatible with the principles above set forth.

"Finally, though reliance upon immunity from jurisdiction amounts to a rejection of the competence of the court, one cannot juridically assimilate such an attitude to a plea of incompetence *ratione loci*, which is purely relative, for the person relying on the immunity is not prepared to accept the jurisdiction of another French court. It thus cannot be contended that a plea based on the immunity must be entered *in limine litis*, and cannot be put forward for the first time on appeal, by reference to the fact that that is so in respect of a plea of incompetence *ratione loci*, from which it differs by its nature, as well as its purpose and its consequences.

"Accordingly, even if one admits the legal possibility of a waiver of immunity from jurisdiction, neither the choice of domicil in the lease, nor the pleadings on the merits before the Court of first instance amounted clearly and unequivocally to a final and unreserved waiver.

"The lease was concluded by Great Britain. It would be artificial to draw a legal distinction, with regard to immunity from jurisdiction, between sovereign acts of a State and acts of a State as a private individual. In fact, every State act refers indirectly or directly, remotely or immediately, to matters of government, public administration, or generally of concern to the interests of the subjects of the State concerned. This fact is evident in the case of a lease concluded by a State in a foreign country for the purpose of establishing a consulate which will protect its nationals residing in that country, control and facilitate their commercial operations, protect the person and property of its expatriated nationals, control and facilitate their stay and movement, all in the national interest."

[Report: *Revue critique de Droit international privé*, 40 (1951), pp. 307–310.]

Exemption from Jurisdiction—Foreign States—Indirectly Impleading a Foreign Sovereign State—Republic of the South Moluccas—Factual Existence of State—Effect of Recognition—The Right of Self-determination—Right to Sue—Assistance by Private Dutch Shipping Company in Military Actions of Republic of Indonesia against the New Republic—Claim for Damages for Tort. **Case No. 39**

REPUBLIC OF THE SOUTH MOLUCCAS *v.* ROYAL PACKET SHIPPING COMPANY.

Holland, District Court of Amsterdam. November 2, 1950.

Court of Appeal of Amsterdam. February 8, 1951.

THE FACTS.—On April 24, 1950, the Council of the Southern Moluccas proclaimed the Republic of the South Moluccas (Republik Maluku Selatan) to be a sovereign State. This was done in reliance upon the pledges of the Republic of Indonesia to grant the right of self-determination to those peoples in Indonesia who did not wish to form part of the new Indonesian State, or at least who were willing to form part of it only as a distinct political organisation.[1] Thereupon the Republic of Indonesia resorted to force against the South Moluccas in the shape of a military expedition, troops for which were carried from Java to the Island of Amboina in vessels belonging to the defendant Company (Koninklijke Paketvaart Maatschappij—for brevity hereinafter referred to as K.P.M.), which was incorporated under Dutch law. Subsequently the legal representatives of the Republic of the South Moluccas in the Netherlands applied to the District Court of Amsterdam for an injunction to restrain the K.P.M. from placing their vessels at the disposal of the Republic of Indonesia for that purpose, on penalty of forfeiting 250,000 guilders for each day of failure to comply with the injunction. The defendant Company argued that the new Republic had no existence in law or any *persona standi in judicio*, and contended that its own actions could not be judged independently of those of the Republic of Indonesia, which was immune from the jurisdiction of the Netherlands courts. The nature and extent of the recognition granted to the Republic of the South Moluccas by Holland appear from the *Held* below.

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[1] For further details see *infra*, Case No. 49, *sub nom. Aponno et Al.* v. *The State of the Netherlands* (*Amboinese Soldiers' Case*).

Held (by the President of the District Court): that the injunction must be granted. In the first place the Republic of the South Moluccas existed as a State under Netherlands law. In the second place, the Court had jurisdiction, seeing that the claim for damages was based on a tort alleged to have been committed by a Netherlands shipping corporation possessed of legal personality under Dutch law. As to the contentions of the defendant Company that the Republic of the South Moluccas did not exist in law and did not possess legal capacity to sue or be sued, the President concurred with and adopted the reasons given by the Netherlands International Law Association at its meeting of June 24, 1950, for its opinion that the Republic of the South Moluccas had the right to maintain its independence against all others. These reasons ran as follows: " The Amboinese population inhabiting the territory of the South Moluccas is a ' population of a territory ' as referred to in Article 2 (1) of the Agreement on Transitional Measures made between the Kingdom of the Netherlands and the Republic of the United States of Indonesia (Republik Indonesia Serikat—R.I.S.) at a Round Table Conference, so that this population has the right to form itself into a separate ' component State ' in the manner therein provided, and thereupon, by virtue of Article 2 (2) of the Agreement, to decide whether to accept or reject the final Constitution of the R.I.S.—in other words, to remain part of that Republic or to withdraw from it—and to acquire a special relationship to the R.I.S. and the Kingdom of the Netherlands. The right of self-determination granted to the Amboinese population by these international legal instruments could no longer be exercised in the manner provided therein, owing to the fact that repeated appeals, before April 24, 1950, by the Government of the Component State of East Indonesia to the Governments of the R.I.S. and the Kingdom of the Netherlands respectively and to the United Nations Commission for Indonesia to apply that provision were rejected or ignored, from which it clearly appeared that the realization of the right of self-determination of the populations inhabiting the territory of the Component State of East Indonesia in that manner and in that form was impossible. This impossibility of exercising the right of self-determination in the manner provided in Article 2 of the Agreement on Transitional Measures was confirmed by the decision taken on May 20, 1950, by the Government of the R.I.S. to abolish the federal structure of that Republic, which had formed the basis of all the Agreements concluded at the Round Table Conference and had been internationally agreed upon, and to create a so-called unitarian State, as a result of which decision the component States existing at the time of the conclusion of those Agreements have been deprived of the opportunity to withdraw from the R.I.S. and to apply for a special relationship to the R.I.S. and the Kingdom of the Netherlands. The Council of the Southern Moluccas, therefore, as the representative of the Amboinese population and the territory of the South Moluccas, was entitled itself to exercise the right of self-determination to which that population was entitled by international law, by proclaiming an independent State—the Republic of the South Moluccas—on April 24, 1950. . . . There is therefore no question of a ' revolt ' on the part of the Amboinese population against the lawful Government, because that Government, which in Article 2 of the Agreement on Transitional Measures virtually granted the population the right of self-determination—including the right to secede from the Government—had now prevented that population from formally exercising the right of self-determination in the manner provided."

Accordingly, the President of the District Court was unable to agree with the view expressed in the argument of the defendant Company that at the Round Table Conference only the larger component States were thought of in connection with the right of self-determination, and not territories such as that of the South Moluccas. Article 2 of the Agreement on Transitional Measures, which provided that the division of the R.I.S. into component States should ultimately be determined by the Constituent Assembly in accordance with the regulations of the provisional Constitution of the Republic, contained the restriction that " the population of territories to be designated . . . should hold a plebiscite on the question whether they should form a separate component State ". From this it followed that there was no ground for an identification of such territories with the component States which already existed under Netherlands sovereignty. Moreover, the South Moluccas then already formed a separate *daerah* or province of the component State of East Indonesia, and, in view of the great difference in racial character between the people of the South Moluccas and the other peoples of the (East) Indian Archipelago, especially the population of Java, it must be presumed that the territory of the South Moluccas was qualified for " designation " within the meaning of Article 2.

The disputed question whether recognition of a State was essential for its capacity to appear as a party to a civil action, did not have to be answered in the present case, since recognition

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by the Netherlands of the Republic of the South Moluccas (which existed in fact, as has been shown above) was contained in the Netherlands Act of Parliament of December 21, 1949 (*Staatsblad* No. J 570)—Transfer of Sovereignty over Indonesia Act—by which the said Agreement on Transitional Measures was approved and thereby became part of the Act. The plaintiff therefore existed in the eyes of Netherlands law and was entitled to sue as a party in this action.

With regard to the plea that a Netherlands court had no jurisdiction to judge the legality of governmental acts and measures which a foreign State had done or taken in the exercise of its sovereign powers, this was, in general, true. The question remained, however, whether in view of the development of international law since 1945 this still held good when there had been an undoubted abuse of power or, worse, a denial of the fundamental human rights and freedoms which the Kingdom of the Netherlands and the R.I.S. agreed to recognize in Article 3 of the Statute of Union. However, the present case concerned a complaint of an illegal act on the part of a Netherlands corporation established in the Netherlands, an act consisting of co-operation in the infringement of a right assured to the plaintiff Republic and its population by a Netherlands Act of Parliament, as a result of which the plaintiff suffered damage. In those circumstances a Netherlands court was not called upon to refrain from exercising jurisdiction, the less so because, according to Article 18 of the Statute of Union, in the event of a conflict between provisions of the law of either partner in the Union or public authorities within their jurisdiction, on the one hand, and provisions of the Statute of Union, of any agreement between the partners, or of any joint regulation, on the other hand, the latter category of provisions were to prevail.

The Court concluded : " Since the Republic of Indonesia makes and has made use of ships chartered from the defendant Company for the transport of troops and materials in connection with its armed assault against Amboina and other South Moluccan islands, and since this armed assault constitutes an infringement of the right of self-determination assured to the plaintiff Republic by the Transfer of Sovereignty over Indonesia Act, and thereby at the same time an infringement of the human rights and freedoms recognised by the same Act, the defendant Company, by allowing its ships to be used for this purpose, took part in an illegal act against the plaintiff Republic and its people who in consequence suffered damage thereby."

The defendant Company appealed.

Held (by the Court of Appeal) : that the Netherlands courts were without jurisdiction and the appeal must be allowed. Irrespective of the question whether the Republic of the South Moluccas had or had not been recognized *de facto* or *de jure* by the Netherlands, the Republic could be admitted as a party to legal proceedings in Holland if it existed *de facto*, as was in fact the case. On the other hand, in view of the immunity of the Indonesian Republic the Court was not competent to enquire into an allegation of tort committed by the K.P.M. in assisting that Republic in the exercise of its *jura imperii*. In the present case the parties could be taken, for the sake of argument, to have agreed on the fact that the Netherlands Government had not yet recognised the Republic of the South Moluccas as a State, unless the President was correct in his finding that such recognition was implied in the Netherlands Act of December 21, 1949 (*Staatsblad* No. J 570). There was no need for the Court to decide this point, since in the absence of such recognition the Republic of the South Moluccas could for the purpose of the case be deemed to be a State existing *de facto*. Now that the Republic had, by bringing an action in Holland against a Dutch corporation, clearly submitted itself to the jurisdiction of a Netherlands court, that Court must decide independently whether there was such prima facie evidence of *de facto* existence as was sufficient in summary proceedings.

When still entirely under Netherlands rule the territory of the South Moluccas, by reason of its geographical situation and the race, culture and common interests of its population, formed a natural and organic unity, with its own local system of government. In the new situation which had developed since the Second World War this territory and its population had retained the same unity and organization in the form of a *daerah* (province), whose local government consisted of the Council of the Southern Moluccas. This local government resolved provisionally to join, as a *daerah*, the Negara Indonesia Timur (Component State of East Indonesia) and the Republik Indonesia Serikat (Republic of the United States of Indonesia), in which it was hoped to unite all parts of Indonesia. This took place by virtue of a Decree of the Council of the Southern Moluccas of March 11, 1947. The Agreement of Linggadjati of March 25, 1947, which was made shortly afterwards between the Netherlands Government and the Government of the Republic of Indonesia, as the *de facto* Government over Java, Madura and Sumatra, contained, so far as presently relevant, the following provisions :

> Article 3 : " The United States of Indonesia shall comprise the entire territory of the Netherlands Indies provided, however, that in case the population of any territory, after due consultation with the other territories, should decide by democratic process that they are not, or not yet, willing to join the United States of Indonesia, they can establish a special relationship for such territory to the

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United States of Indonesia and to the Kingdom of the Netherlands."

Article 4: "(1) The component parts of the United States of Indonesia shall be the Republic of Indonesia, Borneo, and the Great East without prejudice to the right of the population of any territory to decide by democratic process that its position in the United States of Indonesia shall be arranged otherwise."

Article 5: "(1) The constitution of the United States of Indonesia shall be determined by a constituent assembly composed of the democratically nominated representatives of the Republic and of the future partners of the United States of Indonesia, to which the following paragraph of this Article shall apply.

"(2) Both parties shall consult each other on the method of participation in this constituent assembly by the Republic of Indonesia, by the territories not under the authority of the Republic and by the groups of the population not, or insufficiently, represented, with due observance of the responsibility of the Netherlands Government and the Government of the Republic respectively."

Further, the "Renville Principles", agreed upon on January 17, 1948, as the basis for the political discussions between the Netherlands and the Republic of Indonesia, so far as is here relevant, provided as follows:

> "2. It is understood that neither party has the right to prevent the free expression of popular movements looking toward political organisations which are in accord with the principles of the Linggadjati Agreement.
>
> "3. It is understood that decisions concerning changes in administration of territory should be made only with the full and free consent of the population of those territories and at a time when the security and freedom from coercion of such populations will have been ensured. . . .
>
> "6. That provision be made for a suitable period of not less than six months nor more than one year after the signing of the agreement, during which time uncoerced and free discussion and consideration of the vital issues will proceed. At the end of this period, free elections shall be held for self-determination by the people of their political relationship to the United States of Indonesia. . . .
>
> "11. A sovereign State shall be formed on a federal basis under a Constitution determined by democratic processes."

And, in point 6 of the Additional Principles:

> "Should any State decide not to ratify the Constitution and desire, in accordance with the principles of Articles

> 3 and 4 of the Linggadjati Agreement, to negotiate a special relationship with the United States of Indonesia and the Kingdom of the Netherlands, neither party will object."

The Van Royen-Roem Agreement of May 7, 1949, also presupposed a federal Indonesian State subject to the absolute right of self-determination of the Indonesian peoples, as affirmed by the Agreements of Linggadjati and Renville. Both the federal Constitution and the principle that, in spite of the fact that the transfer of sovereignty to the R.I.S. took place earlier than was originally intended, the peoples of such territories as should be qualified therefor ought to have the opportunity of exercising the right of self-determination by democratic means, were always adhered to in the discussions at the Round Table Conference at which the preliminaries for the transfer of sovereignty were drawn up. This was clearly expressed in Articles 1, 42, 43, 44, 46, 50 *et seq.*, 111, 117, 187 (2) and 189 (4) of the Provisional Constitution of the R.I.S., on which terms the said Republic, according to Article 1 of the Charter of the Transfer of Sovereignty, accepted the sovereignty over Indonesia and the Kingdom of the Netherlands transferred that sovereignty to the Republic. The Court referred to Article 2 of the Agreement on Transitional Measures, which together with the said Charter and the Statute of Union were annexed to the Covering Resolution and, according to Points 1 and 11 of that Resolution, formed part of the acts of the Round Table Conference. The acceptance thereof by the Kingdom of the Netherlands, on the one side, and the territories which joined the said Republic, on the other side, was to be regarded as a ratification of the documents thus annexed to the Resolution. The above-mentioned Article 2 of the Agreement on Transitional Measures reads as follows :

> " 1. The division of the Republic of the United States of Indonesia into component States shall be established finally by the Constituent Assembly in conformity with the provisions of the Provisional Constitution of the Republic of the United States of Indonesia, it being understood that a plebiscite will be held among the population of territories thereto indicated by the Government of the Republic of the United States of Indonesia upon the recommendation of the United Nations Commission for Indonesia or of another organ of the United Nations, under the supervision of the United Nations Commission for Indonesia or other United Nations organ referred to, on the question whether they shall form a separate component State.
>
> " 2. Each component State shall be given the opportunity to ratify the final Constitution. In case a component

> State does not ratify that Constitution, it will be allowed to negotiate concerning a special relationship towards the Republic of the United States of Indonesia and the Kingdom of the Netherlands."

The Court also referred to the debates on the Draft Charter of Transfer of Sovereignty over Indonesia in the First and Second Chambers, where this right of self-determination was discussed at length, with frequent reference to the South Moluccas, and continued: " Very soon after the transfer of sovereignty had become an accomplished fact by the above-mentioned Act of December 21, 1949, namely, in or about April 1950, before any part of Indonesia had been given the opportunity to exercise any form of self-determination, instead of the federal State which had been promised by the above-mentioned Provisional Constitution, a unitarian State was created, called the Republic of Indonesia, which claimed to embrace the whole of Indonesia and which was publicly proclaimed as such on August 17, 1950. This unitarian State, in furtherance of its purpose, by taking armed action in Macassar and by other means, put an end to the component State of East Indonesia, of which the South Moluccas had provisionally formed a part since March 1947. By way of reaction to these measures the Committee of the Council of the Southern Moluccas, towards the end of April 1950, proclaimed the Republic of the South Moluccas in the territory of the South Moluccas as a free and sovereign State, evidently because those measures had deprived the inhabitants of the South Moluccas of the possibility of exercising the right of self-determination by democratic and constitutional means. Since the end of April 1950 the new State thus proclaimed, making use of the original '*daerah*', governed the South Moluccas without disturbance, or at any rate without apparent disturbance, until the Republic of Indonesia about the end of September 1950 launched the attack on the South Moluccas as described in the writ in this action. As far as can be judged from the information obtained in this country, this attack, although undertaken with a considerable number of troops, met with stubborn resistance. The radio station of Amboina was still heard on November 23, 1950, and was therefore up to that date apparently in the hands of the South Moluccas Republic—a considerable time, therefore, after the present proceedings had been instituted—and the military operations had, as far as was known here, not yet come to an end. It appears from a copy of a document produced before the Court that the Government of the South Moluccas issued a Decree on May 30, 1950, which regulated the nationality of persons living in its territory. There was also produced in Court a statement made by several former Netherlands officials in the Moluccas, dated December 28, 1950, the purport of which was that they had been present in Amboina on April 24 and 25, 1950, and had there witnessed the proclamation of the South Moluccas Republic, which, according to them, was not due to compulsion by former members of the Royal Netherlands East Indian Army but was a reaction to the events in Macassar at the beginning of April 1950. This proclamation was made by the Government of the '*daerah*', the Council of the Southern Moluccas, after the inhabitants had expressed their desire therefor in various large public meetings."

In view of the foregoing facts, circumstances and evidence, the Court was of the following opinion: (1) The people of the South Moluccas are a people of a territory, which under the provisions of the Agreements of Linggadjati and Renville and of Article 2 of the Agreement on Transitional Measures could qualify for the exercise of the right of self-determination and as such had the right to try to exercise this right of self-determination in the manner there laid down, which right they had expressly reserved to themselves. (2) The possibility of realizing the right of self-determination in this manner was in effect taken away from the people of the said territory by the creation by the Republic of Indonesia of a unitarian State for the whole of Indonesia under its own leadership and supreme authority, contrary to what was agreed upon in the above-mentioned pacts and at the Round Table Conference. (3) Viewed in the light of (1) and (2) above, the proclamation of the Republic of the South Moluccas must be regarded as a method of exercising the right of self-determination by or on behalf of the said people, which was permissible in the given circumstances. (4) The authority of the Republic of the South Moluccas and its Government over the inhabitants of the territory of the South Moluccas, from the point of view of duration, nature and extent, satisfied—or at any rate before the invasion by the Republic of Indonesia and also about the time when these proceedings were instituted, satisfied—the condition of stability and effectiveness sufficiently to be regarded as the authority of an existing State. The possibility that this authority might ultimately not be able to maintain itself against the superior might of the Republic of Indonesia did not prevent the recognition for the time being, in summary proceedings, of the Republic of the South Moluccas as an independent State, and consequently the granting to it in such an action of the right of *persona standi in judicio*. Moreover, there was no evidence of any facts or circumstances from which it might be deduced that the Republic of the South Moluccas had ceased to exist in the meantime.

The illegality of the actions of the Shipping Company was said to consist exclusively in its participation, by placing its vessels at the disposal of the Republic of Indonesia for the

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conveyance of troops and war material, in illegal warlike action committed by that Republic against the Republic of the South Moluccas. In the Act of December 21, 1949, the Kingdom of the Netherlands unconditionally and irrevocably transferred its sovereignty over Indonesia to the Republic of the United States of Indonesia and recognized it as a sovereign State. After having openly substituted itself for that (federal) Republic on August 17, 1950, the (unitarian) Republic of Indonesia was recognized again as a sovereign State, and as its partner in the Union, by the Netherlands Government. Adjudication by the Court of the claim in this action was impossible without pronouncing judgment on the warlike actions of the Republic of Indonesia and without stating at the same time that those actions were unlawful. The jurisdiction of a Netherlands court did not, however, extend to such a finding, since, under Article 13 (*a*) of the Act containing General Provisions on the Legislation of the Kingdom, it was limited by the exceptions recognized by the law of nations. According to that law a sovereign State was not, at least in so far as acts committed by it *jure imperii* were concerned, subject to the jurisdiction of any other State, except in virtue of a voluntary submission. This rule was founded on the principle that sovereign States were equal in their international status. It was impossible, therefore, for the courts of one State to pronounce judgment on acts done by another State *jure imperii* ; and that applied to the warlike actions imputed to it in the writ in this suit. This rule of international law applied even when the State whose actions were under review was not itself a party to the proceedings. That must certainly be assumed in a case such as the present, where for the plaintiff Republic to succeed it must prove the unlawfulness of the actions of the Republic of Indonesia ; the latter would be entitled to oppose such an award as an intervening party, should it be willing for that purpose to submit to the jurisdiction of a Netherlands court. . . . Hence it followed that, however unlawful it might hold the war-like operations and the attack by the Republic of Indonesia upon the Republic of the South Moluccas to be, and even if they infringed the fundamental human rights and freedoms invoked by the President of the Court below, a Netherlands court had in law no jurisdiction to pronounce judgment thereon.

[Report : *N.J.*, 1951, No. 129.]

Note.—Neither side lodged an appeal in cassation since, on technical grounds, there was no prospect of success in that instance. Instead, a new action was at once brought on a slightly different legal basis. This new case will be reported in a future volume.

States—Immunities of—Immunity from Taxation—Property of State Occupied by Consul-General for Official Purposes—Whether Liable to Assessment for Municipal Taxes—The Law of Canada. **Case No. 40**

YIN-TSO HSIUNG *v.* TORONTO.

Canada, Ontario High Court.

(Smily J.)

May 25, 1950.

THE FACTS (as stated by the Court).—" The plaintiff, during the years 1946, 1947, 1948 and 1949, was a citizen of the Republic of China and was the Consul-General of career of the said Republic of China at the City of Toronto, in the Province of Ontario. Certain freehold land and premises known as No. 144 Riverview Drive, in the said City of Toronto, were held by the plaintiff in trust for the Government of the said Republic, and were occupied and used by the plaintiff with his subordinate officers, consisting of Consuls and Vice-Consuls of career and staff, all citizens of the Republic of China and employed by its Government, during those years as and for the public use of the Consulate-General representing that Government. The plaintiff as Consul-General lived on the premises with his family during the said years.

" The defendants, the Corporation of the City of Toronto, imposed certain realty taxes for the said years amounting in the aggregate to $4,801.11, in respect of the land and premises. The plaintiff claims a declaration that the lands and premises are immune from rates and taxes levied by the defendant against him for those years, on the ground that the land was the public property of the Government of the Republic of China during the said years and was used by the Chinese Government for the public use of the Chinese Consulate-General."

Held : that the property at issue was not liable to assessment. The Court said :

" Property of a foreign Government occupied by its Consul-General and his staff and used for the public purposes of the foreign state is covered by the principles of immunity from local taxation recognized by international law. The *Assessment Act*, R.S.O. 1937, c. 272, is properly construed to preserve this immunity, and hence the municipality in which the property is situate may not assess it for realty taxes nor seek to enforce such taxes against the property, at least where the taxes do not cover payment for commodities, such as water rates, although they do purport to cover services such as street cleaning, garbage collection and school rates. It is not a proper ground for denying the claim of immunity that the

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Consul-General did not appeal against the assessment of the property, and that therefore by the terms of the Act the assessment is confirmed. Since there is no power to make the assessment, the Act cannot apply."

The Court continued :

" The question to be decided here, as I view it, is not fundamentally unlike two of the questions dealt with by the judgment of the Supreme Court of Canada in *Reference re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943], 2 D.L.R. 481, S.C.R. 208. I shall, therefore, refer freely to the judgment therein and particularly to the judgment of Chief Justice Duff (as he then was) wherein are set out many references and authorities. . . ." [The bulk of the judgment in the present case consists in fact of quotations from the *Reference* case.]

" I have, of course, fully recognized that the *Reference* case in the Supreme Court of Canada and many of the authorities referred to deal with the property of a foreign Government occupied by an Ambassador or diplomatic representative but the *ratio decidendi* would appear to be as much that the property is owned by and used for the public purposes of the foreign Government as that it is occupied by the Ambassador or public Minister of the foreign Government, as indicated in the quotation from the judgment of Brett L.J. in *The Parlement Belge* case . . . and which was quoted with approval in *Compañía Naviera Vascongado* v. *Cristina*, [1938] A.C. 485, by Lord Wright at p. 506, as mentioned in the judgment of Hudson J. aforesaid at pp. 513–514 D.L.R., p. 243 S.C.R., and which I repeat here : ' The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.'

" I am therefore of the opinion that the property of a foreign state occupied by its Consul and used for the public purposes of such state are not liable to taxation by municipal corporations in this Province.

" It is, however, contended on behalf of the defendant that the question is determined against the plaintiff because [he] did not appeal against the assessment of the property for taxes under the provisions of the *Assessment Act*, and that the assessment is confirmed by virtue of the provisions of that

Act. If the *Assessment Act* is to be construed as saving the privileges of foreign states, and there is no power to make the assessment, the provisions of the Act are not applicable."

[Report: [1950] 4 D.L.R. 209.]

States—Exemption from Domestic Jurisdiction—Distinction between Acts of a Private Law and Public Law Character—Confiscation—Nationalization of Private Enterprise—Extra-Territorial Effect of Nationalization—Property Situate in Foreign Territory—Whether Affected by Nationalization of Enterprise. **Case No. 41**

DRALLE *v.* REPUBLIC OF CZECHOSLOVAKIA.

Austria, Supreme Court. May 10, 1950.

THE FACTS.—The appellant was the representative in Austria of the German firm of Georg Dralle, manufacturers of cosmetics in Hamburg. The firm of G.D. owned certain trade marks which were registered in the Austrian Register of Trade Marks and which were applied to goods manufactured by them and offered for sale by the appellant in Austria. Since 1910 there had been established at Bodenbach, in the province of Bohemia, which subsequently became part of Czechoslovakia, a branch office of the Hamburg firm; this branch office was the registered owner, by consent of the parent firm in Hamburg, of the trade marks registered by the latter in the Austrian Register. In 1945 the branch office was nationalized by virtue of a Czechoslovak nationalization decree, and the nationalized firm thereupon laid claim to the trade marks formerly owned by its predecessor. The nationalized firm having requested the appellant's customers in Austria not to offer for sale under the said trade marks any of the goods supplied by the appellant, the latter applied for an injunction to restrain the Czechoslovak firm (the respondents) from using the said trade marks in the territory of the Austrian Republic. The respondents claimed to be immune from the jurisdiction of the Austrian courts, and claimed to be entitled in any event to use the trade marks concerned.

Held: (i) that, as in the present case the respondent's claim to immunity from jurisdiction was concerned with the commercial activities of a foreign sovereign State, viz. the Republic of Czechoslovakia, and not with its political activities, the respondents were subject to the jurisdiction of the Austrian courts;

(ii) that the Czechoslovak nationalization decree, although valid in the territory of Czechoslovakia, had no extra-territorial effect, and that, accordingly, the respondents were not entitled

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to use, in the territory of the Austrian Republic, trade marks owned by their predecessors in title ;

(iii) that, in the result, the appellant was entitled to an injunction restraining the respondents from using the trade marks in the territory of the Austrian Republic.

The Court said :

" II. Before dealing with the merits of the appeal the Supreme Court must decide whether jurisdiction can be exercised in the present case. The respondent is the State of Czechoslovakia, regardless of the fact that it engages in business under a firm name ; the firm merely constitutes a name, and by virtue of the use of that name there does not come into existence a new legal entity which is distinguishable from the owner of the firm.

" The question whether a foreign State can be sued in the municipal courts has not been answered in a uniform manner by the Austrian courts. The older practice of all countries was to exempt foreign States from municipal jurisdiction, the exceptions being at the most actions *in rem* and voluntary submission to the jurisdiction. This was also the attitude of Austrian courts until the turn of the century, as exemplified by Gl U 2694, 2698, 6549, 6771, 7589, ll. 709, and Gl UNF 1804. The first decision to depart from this principle was the judgment of December 17, 1907 (see Röll, *Eisenbahnrechtliche Entscheidungen*, XXI (1907) No. 122). This judgment states that ' the State as entrepreneur is a juridical person within the realm of private law and can, therefore, be sued in the ordinary courts in all matters concerning private law. . . . This applies undoubtedly to the home State, but there is no reason to depart from this principle in the case of a foreign State. This does not constitute an infringement of territorial sovereignty any more than does the act of suing a foreign national in a municipal court. . . .' "

(The Court, having reviewed a number of decisions confirming the principle set out above, continued) :

" A further judgment was given on January 5, 1920, (SZ. II/I). In this case the Ottoman State was sued for payment for certain building work carried out at the Embassy in Vienna by order of the Ottoman Ambassador. The Supreme Court decided in favour of municipal jurisdiction on the following ground : ' The view that the concept of sovereignty of a State includes the absolute freedom of that State from the jurisdiction of every foreign court is not correct. It is true that in matters concerning the sovereignty of a foreign State, which sovereignty serves as the basis for the application of the rules of international law, municipal jurisdiction cannot be assumed. Where, on the other hand, the foreign State conducts itself as the holder of ordinary private rights and enters into contracts to be performed within the territory (*i.e.* Austria), it enters the confines of the legal system of that territory and cannot therefore remain entirely independent thereof ; in such cases the foreign State too must be subject to the jurisdiction of the State in whose territory the business enterprise is domiciled. In the case under review we are concerned with such a claim under private law which does not concern the sovereignty of the defendant State in any way. The reference to principles applicable to the exterritoriality of ambassadors is out of place because the object of exterritoriality is to exclude everything that might hinder the ambassador in carrying out his mission ; this latter consideration is not in question here.' "

" In later judgments the Supreme Court, apparently under the influence of Walker's book on *Private International Law,* abandoned this practice and returned to earlier case law. Henceforth it again required express submission to municipal jurisdiction. In the case which formed the basis of the judgment of January 20, 1926 (ZBl. 1926, No. 134), the Czechoslovak State Railways had ordered machines from a firm in Vienna. The offer contained a clause that the courts of the supplier's domicile were to exercise jurisdiction. The Supreme Court denied the competence of the municipal court whose jurisdiction had been invoked, on the ground that the agreement between the parties did not clearly provide for the right of the municipal courts to exercise jurisdiction and compulsory powers. Such a clear provision was regarded as all the more necessary in view of the fact that the submission of a foreign State to municipal jurisdiction implies a waiver of exterritoriality, and that, for this reason, such a waiver which runs counter to the essential nature of a sovereign State can only be inferred from such acts of that State as clearly show an intention to waive. . . ."

(After reviewing a number of other judgments which upheld claims to immunity, except in cases of express and voluntary submission by the States concerned, the Court continued) :

" The only judgment published since 1945 shares this view. This judgment (of September 17, 1947 ; 1 Ob 621/47, JBl. 1947, 491) dismissed a claim for damages against the German State Railways, on the ground that there was no jurisdiction. The German State Railways were said to be the property of the German Reich, and the municipal courts are not entitled to assume jurisdiction over foreign States. This was said to be acknowledged in doctrine and jurisprudence. The judgment did not make reference to the decisions previously referred to which expressed the opposite view. In the result, therefore, it cannot be said that there is any uniformity of case law in so far as concerns the extent to which foreign States are subject to Austrian jurisdiction. In view of the fact that we are here concerned with a question of international law we have to

Case No. 41 *Contd.* examine the practice of the courts of civilised countries and to find out whether from that practice we can deduce a uniform view ; this is the only method of ascertaining whether there still exists a principle of international law to the effect that foreign States, even in so far as concerns claims belonging to the realm of private law, cannot be sued in the courts of a foreign State.

" The first court to enunciate the principle that in matters belonging purely to the realm of private law foreign States cannot claim immunity was the Court of Cassation of Naples in a judgment of March 27, 1886 (*Giurisprudenza Italiana*, 1886, I, 1, 228). A few months later the Court of Cassation of Florence (in a judgment of July 16, 1886 : *Giurisprudenza Italiana*, 1886, I, 1, 486) followed this decision. The Court of Cassation of Rome did likewise on July 1 and October 12, 1893 (*Giurisprudenza Italiana*, 1893, I, 1, 1213). The case was concerned with the following facts :

" On May 17, 1866, the Austrian Government made an agreement with a certain firm by the name of Fisola by which the latter undertook to build fortifications along the Venetian border. When Venetia had ceased to be part of Austria, the Austrian State refused to pay for the work. The Court of Cassation of Rome decided in favour of municipal jurisdiction, mainly on the ground that a distinction must be made between a case in which a Government acts in its capacity of *ente politico* and a case in which it acts in its capacity of *ente civile*. In the former case its acts cannot be subject to adjudication by foreign tribunals, while in the latter case the Government acts in the capacity of a legal personality of private law and is, therefore, subject to the rules of private law. . . ."

(The Court then referred to more recent cases in which this view was affirmed by Italian courts : Corte di cassazione 1925 No. 1456 ; Corte 1926 No. 1661 ; and the judgment of August 3, 1935, reported in *Giurisprudenza Italiana*, 1935, I, 1, 109.)

" In 1903, in the case of *Société Anonyme des Chemins de Fer Liégeois–Luxemburgeois* v. *The Netherlands* (June 11, 1903, *Clunet*, 1904, 417), the Belgian Court of Cassation followed this practice. The plaintiff company had agreed with the Netherlands Railway Administration to enlarge a station building which was being used by both parties, and it claimed from the Netherlands a sum of money payable by the latter and which the plaintiff company had advanced. The Court of Cassation rejected the plea to the jurisdiction on the ground that ' the immunity of foreign States from the jurisdiction of foreign courts can be invoked only where their sovereignty is affected thereby ; this was the case only in so far as concerned acts relating to the political life of a State. Where, on the other hand, the State, in taking account of the needs of the community, does not confine itself to its political role, but on the contrary acquires and possesses property, concludes agreements, constitutes itself creditor and debtor and even engages in commerce, it does not set in motion executive power, but merely does what private individuals can do ; in such a case it acts like a private individual. . . .' The Court of Cassation added that in all these cases the competence of the municipal courts derives not from the consent of the defendant State, but from the nature of the act and the capacity in which the State has intervened.

" The recent jurisprudence of the Swiss courts has moved in the same direction. The judgment of the Federal Court of March 13, 1918 (BG. 44 I 54), affirmed, on the application of the holder of an issue of an Austrian government loan, an interim injunction against the Austrian Ministry of Finance ; broadly speaking, the reasons given were as follows : ' The principle of exterritoriality and of the exemption of a foreign State from the jurisdiction of the municipal courts cannot, by any means, be recognised as generally and unconditionally applicable. It is quite true that there is a widely acknowledged doctrine which infers from the sovereignty and mutual independence of States as recognised by international law that a State is immune from foreign jurisdiction, not only in relation to acts in the exercise of its sovereign power (*jure imperii*), but also, generally speaking, in so far as concerns its capacity as a party to private legal relations (*jure gestionis*). This practice is followed more particularly by German, Austrian, French, English and North-American courts. . . . This practice must be contrasted, since 1886 and 1903, respectively, with the practice of the Italian and Belgian courts according to which a foreign State can be sued in the municipal courts, like a private individual, when acting in the capacity of a party to private legal relations. . . . Having regard to the legal position as here set out the competence of the Swiss Courts must be unreservedly recognised. The legal relationship between the Austrian State and the bondholders which results from the issue of the bonds concerned falls within the realm of private law. . . .' "

(The Court then proceeded to review other Swiss judgments which likewise stress the difference between *acta juris imperii* and *acta juris gestionis*, and continued) :

" The judgments of the Mixed Tribunals in Egypt draw the same distinction. In its judgment of November 24, 1920 (*Clunet*, 1921, 271), concerning a case against the English Crown arising out of a collision at sea, the Mixed Court of Appeal stated that acts done in the exercise of the sovereignty of a foreign State were not subject to the jurisdiction of a foreign court, but that the position was entirely different where an act, as *e.g.* a quasi-delict in the case under review, had been done by the employees of a foreign State in its private

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interest and without any connection whatever with its political activity. To concede immunity from jurisdiction in such a case would be a denial of justice (*négation de la justice*) because it would deprive of the protection of the law those individuals whose interests are in conflict with the private interests of the State concerned. . . . The Court of Appeal added that the lack of jurisdiction of the court of one State over another State is only relative, it being generally acknowledged that a foreign Government could proceed in the courts of another State as plaintiff against those persons who are subject to the jurisdiction of that State, and that it was bound to submit to a suit before a court of that State in matters concerning immovable property there situate. The Court of Appeal argued from this that lack of jurisdiction cannot be pleaded by a foreign State where the latter has acted as an ordinary private individual."

(After referring to other judgments of the Mixed Tribunal, the Court continued) :

" Among States which in principle recognise immunity from jurisdiction even where *acta gestionis* of private law are concerned are Germany (*RGZ*. 62, 165 ; 103, 274), England (in particular a judgment given in 1880), the United States (in particular a judgment given in 1812—see the digest of the jurisprudence of the United States of America in *Revue générale de Droit international public*, 1936, pp. 603 *seq*.), Czechoslovakia, Poland (judgment of the Supreme Court of Warsaw of March 2, 1936, *Annuario di diritto comparato*, II/III, p. 768) and Portugal (judgment delivered in 1923 and referred to in *Revue générale de Droit international public*, 1934, p. 545), also France (in particular a judgment of January 24, 1849, DP. 49, 1, 9). The French courts, however, have deviated from this jurisprudence in so far as concerns a foreign State regularly engaged in commerce in France. In proceedings instituted against the Trade Mission of the U.S.S.R. the Court of Appeal, for the first time, in its judgment of November 19, 1926 (*Revue de Droit international privé*, 1927, 251), laid down the principle that the Mission could be sued in respect of commercial transactions entered into in France. In the course of proceedings before the Court of Cassation the plaintiff obtained an opinion from the General Secretary of the Ministry of Foreign Affairs in which the Secretariat stated that negotiations were then in progress with the Soviet Union with regard to this question. The Secretariat added : ' Nevertheless, my department has, for the time being, accepted the view that this organisation (the Russian trade mission) must be treated in the same manner as foreign merchants resident in France, and that they are not entitled to any privilege on the pretext that they are an emanation of the Soviet State ' (reprinted in Stoupnitzky, *Statut international de l'URSS* : Paris, 1936, p. 283). The

Court of Cassation affirmed this decision on February 19, 1929 (*Clunet*, 1929, p. 1043) on the ground that the commercial activities of the trade mission extended to all matters, and that these manifestations could only be regarded as commercial matters (*actes de commerce*) which are wholly alien to the principle of the sovereignty of States (similarly the judgment of the French Court of Cassation of December 15, 1936; *Revue critique de Droit international*, 1937, p. 710)."

(The Court then reviewed certain decisions of Greek, Roumanian and Brazilian tribunals which adopted the same view, and continued as follows):

"This survey shows that today it can no longer be said that jurisprudence generally recognises the principle of exemption of foreign States in so far as concerns claims of a private character, because the majority of courts of different civilised countries deny the immunity of a foreign State, and more particularly because exceptions are made even in those countries which today still adhere to the traditional principle that no State is entitled to exercise jurisdiction over another State; by way of example we may refer to a judgment of the Supreme Court of Tennessee (see Harvard Research, 584) which in 1923 assumed jurisdiction over land owned by the State of Georgia which that State had then acquired for the purpose of building a railway. Thus, American courts too admit of exceptions to the classic doctrine of immunity at least in those cases which concern the exercise of jurisdiction over immovables (in the case under review the question arose whether railway land owned by a foreign State could be expropriated for the purpose of widening a road).

"The Resolution passed by the Imperial Economic Conference of the British Empire in 1923 is proof that this movement has also made headway in the Anglo-Saxon countries; the Resolution stated expressly that a Dominion engaged in trade in another Dominion is not, for that reason, entitled to claim freedom from taxation (Harvard Research, 608: 'shall not in its character as such be treated as entitled to any sovereign immunity from taxation either directly or through the claims of superiority to the jurisdiction of municipal courts').

"A similar recommendation is contained in the Report of the World Economic Conference held at Geneva in 1927 (Harvard Research, 607).

"International treaties too have on several occasions recognised the principle that *acta jure gestionis* are not exempt from jurisdiction. Thus, Article 233 of the Treaty of St.-Germain (and similarly the other Treaties concluded near Paris) provide that the Austrian Government if it engages in international trade shall not, in relation to such trade, be or be regarded as being, entitled to claim rights, privileges and immunities of sovereignty.

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" The meaning of this clause is controversial. Some regard it as a *privilegium odiosum* of the Central Powers, others as the manifestation of a new international law. We need not consider which of these two views is correct. As the former Central Powers accepted an obligation, not only in relation to former enemy Powers, but quite generally, to invoke the jurisdiction of foreign courts in commercial matters, we are, in any event, entitled to say that such submission of sovereign States in matters of private law is regarded as being admissible in international law.

" Other treaties too contain similar provisions which are not limited in their application to particular States, as *e.g.* Article 30 of the Paris Air Navigation Convention of October 13, 1919, and Article 2 of the Warsaw Convention for the Unification of Certain Rules regarding Air Transport, of October 12, 1929. Similarly, the various draft agreements of international associations contain proposals pointing in the same direction. The relevant proposal of the Institut de Droit international of 1891 was referred to in the judgment of the Swiss Federal Court (vol. 56, I, 247) to which reference has been made. The Thirty-Fourth Conference of the International Law Association in Vienna, in 1926, again discussed the question, without passing any definitive resolution. The same applies to the sub-committee of the League of Nations which confined itself to publishing a report on the *status causae* on October 11, 1926.

" On the other hand, a detailed draft with reasoned arguments was prepared by the Harvard Law School in 1932 ; its Article 11 contains the following provision :

> ' A State may be made a respondent in a proceeding in a court of another State, when in the territory of such other State it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.
>
> ' The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt.'

" The authors of the draft refer in particular to the jurisprudence of Italy, Belgium and the Egyptian Mixed Tribunals and state that even if the distinction between *acta jure gestionis* and *acta jure imperii* has not been generally recognised, it is time to lay down such a distinction in an international codification (Harvard Research, 606). It is worth mentioning that the introduction (p. 473) refers to a remark made by Chief Justice Marshall, the author of the judgment given in 1812 which is still a leading decision, who said in that judgment that a Head of State who descends into the market place must be treated like any private trader. The various proposals of international associations show that the classic doctrine of unlimited immunity no longer corresponds to the view expressed in legal practice.

" Neither does the literature on the subject present a uniform picture. The Supreme Court must now consider legal doctrine briefly because the *communis opinio doctorum* is also regarded as a source of international law."

(After examining the views of a number of writers of different nationalities, the Court continued) :

" Accordingly, there clearly is no *communis opinio doctorum.* The Supreme Court therefore reaches the conclusion that it can no longer be said that by international law so-called *acta gestionis* are exempt from municipal jurisdiction. This subjection of the *acta gestionis* to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities, either by the purchase of commodities for their diplomatic representatives abroad, or by the purchase of war material for war purposes, etc. Therefore there was no justification for any distinction between private transactions and acts of sovereignty. Today the position is entirely different ; States engage in commercial activities and, as the present case shows, enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and, *ratione cessante,* can no longer be recognised as a rule of international law. . . . For these reasons the Supreme Court reaches the conclusion that in the present case the question of jurisdiction must be answered in the affirmative.

" III. The Court, therefore, now has to deal with the merits of the case."

(The Court then dealt with the question of the plaintiff's right to institute proceedings, and, after deciding in favour of his *locus standi* as licensee of the contested trade marks, continued) :

" The decision in the present contentious proceedings depends on whether the Austrian trade marks registered in the name of the Bodenbach branch of the Hamburg firm became vested in the undertaking which was nationalised in Czechoslovakia. . . . The first prerequisite for the recognition of a transfer of the Austrian marks to the nationalised undertaking is the validity of the nationalisation by the law of Czechoslovakia. This question must be answered in the affirmative. The legal basis of the so-called nationalisation is the decree of the President of the Czechoslovak Republic of October 25, 1945, which provided for confiscation, for the

Case No. 41 *Contd.*

benefit of the State and without payment of compensation, of the property of natural persons of German nationality. This must be held to include not only the property of Sudeten Germans, but also that of other Germans, on the ground that Czechoslovakia was at war with Germany and therefore entitled to confiscate the property of German nationals for so-called purposes of reparation. From the point of view of internal Czechoslovak law, therefore, there can be no doubt that the confiscation of the branch office at Bodenbach of the German firm of Georg Dralle is valid in law. Whether or not this confiscation can be regarded as valid by international law is immaterial in so far as concerns its internal validity. In international law the question is controversial. Verdross in his textbook on international law (p. 304) states that belligerent Powers are not entitled to liquidate enemy property situate in their territory. Georgio Balladore Pallieri, *La guerra* (1935, p. 369), and the authorities there referred to take the opposite view ; in the latter sense also the judgment of the Supreme Court of the United States of December 8, 1947, in *Silesian-American Corporation* v. *Clark* (68 Sup. Ct. 179). The Supreme Court [viz. the Austrian Supreme Court] would, at this stage of the proceedings, be called upon to consider this problem only if it reached the conclusion that war measures permissible by international law are to be regarded as valid also by non-belligerent States in their own territories. This, however, as appears from the prevailing practice and doctrine of international law, is not the case. Thus, the Tribunal of Monaco, in a judgment of May 24, 1917 (*Clunet*, 1917, 1508), held that the plea of a debtor that a law enacted in his home State and prohibiting the making of payments to nationals of an enemy State was unavailing, the prohibition not being binding outside the territory of the home State ; similarly a judgment of one of the Netherlands courts of appeal (*Clunet*, 1917, 236) ; *contra* : a judgment of first instance of the District Court of Rotterdam which allowed the prohibition to be treated as *force majeure* (see Solere, Condition des biens ennemis, in *Rép. de droit international*, IV, p. 465).

" Of particular importance is the judgment of the Court of Chancery of New Jersey, of August 3, 1915 (*Revue*, 1918, 122) which denied all exterritorial validity to war measures on the ground that, if such validity were accorded, neutral courts would become the auxiliary agents of belligerent Powers in their conduct of the war. On the other hand, a judgment of the District Court of New York (given in May, 1915 : *Clunet*, 1915, 930) refused to order an Austrian woman to make payment to an English firm ; the Court relied on the principle of neutrality and stated that, if neutral courts were to act otherwise, they would, where payments had been prohibited by the laws of both States, support the creditor which, in practice, would be tantamount to applying only those war measures which have been enacted for the benefit of defendants. The Swiss Courts have repeatedly had occasion to deal with the effect of war measures enacted by foreign States. The judgment of the Federal Court of December 17, 1914 (BGE 40/I 486; *Revue*, 1917, 351), rejected their validity on grounds similar to those given by the Court of New Jersey, stating that it cannot be the duty of the Federal Court to ensure the operation of extraordinary war measures taken by a foreign State; similarly, a judgment of April 17, 1916 (BGE II, 183; *Revue*, 1917, 348), said that the judge of a neutral State could not be expected to apply foreign enactments which were designed to combat an enemy State in the economic or other fields. The judgment of April 19, 1918 (BGE 44 II 170), repeats that the Federal Court has always adhered to the principle that the war measures of belligerent Powers could not be recognised by the Swiss Courts. The Swiss courts adhered to this jurisprudence in the Second World War. Thus, the Court of Appeal of Zurich, in a judgment of November 11, 1942 (*Schweizerische Juristenzeitung*, XXXIX, 367), did not recognise the appointment of a commissar who was to administer the business of a firm established at Danzig, and the judgment of January 15, 1940 (*Schweizerische Juristenzeitung*, XXXIX, 302), refused to recognise the applicability of a German ordinance concerning the treatment of enemy property in Switzerland. In a judgment of September 25, 1944 (reported by Seidl-Hohenveldern in *ÖJZ*, 1949, 535, note 28), the Swedish Supreme Court refused to recognise the confiscation, by the British Custodian of Enemy Property, of an English company 99% of whose shares were in the hands of German shareholders; it ordered the assets standing to the credit of the company in Sweden to be paid to the German shareholders. The same view has been adopted, without exception, by all writers; see in particular Niboyet, De l'effet en pays neutre des mesures de guerre (*Revue*, 1920, 248 *seq.*), and Droits acquis, No. 62 (in *Rép. de droit international*, V. p. 716); also Dietrich Schindler (in *Swiss Year Book of International Law*, 1946, p. 68 *seq.*), who quotes other Swiss writers, and in particular a book by Sauser-Hall, *Les Traités de paix et les droits privés des neutres*, which follows the same doctrine.

"This Court adopts this view which has been expressed by the doctrine and jurisprudence of a number of States and which is not contradicted by any precedents, *i.e.* the view that war measures have no exterritorial effect and cannot therefore be recognised in a non-belligerent State even if they are valid by international law. In view of the fact that Austria never took part in the war and merely had to suffer the belligerency of third States in a passive capacity, the confiscation of German property in Czechoslovakia can have no effect in so far as concerns property situate in Austria and forming part of the assets of the branch office.

" Neither the Potsdam Agreement of August 2, 1945, nor the Paris Agreement of December 21, 1945, affects the legal position as here stated. The Potsdam Agreement confines itself to distributing to the principal Powers, in a broad manner, the reparations to be paid ; it does not contain any provision from which there can be inferred a duty incumbent upon the countries occupied by the Allies to accord to the confiscatory measures enacted in the territories of the individual Allied States any exterritorial effect beyond that accorded by generally accepted rules of international law. The Paris Agreement is, generally speaking, based on the principle that German assets situate in the territories of the Allied Powers are to be liquidated (Article 6A) ; it does not, therefore, claim any exterritorial validity. On the other hand, Article 6C provides that German property situate in third countries shall be included in such liquidation by virtue of special agreements to be concluded with those countries. . . . The Paris Agreement, therefore, is to be accorded exterritorial validity only to the extent that those States in whose territories such assets are situate have undertaken to accord such validity by means of international agreements, as did Switzerland in the Washington Agreement of May 25, 1946 (*Swiss Year Book*, IV, 148).

" Accordingly, Austria, with whom no agreement has so far been concluded, and who, although forcibly occupied by the German Reich, has not acceded to the Paris Agreement or to the special London Agreement of July 27, 1946, Concerning the Treatment of German Patents, has not undertaken to liquidate German assets. Therefore, Article 6C is not applicable in Austria. Nor does the attitude of Austria indicate that the measures enacted in individual Allied States with regard to the liquidation of assets have any exterritorial effect in Austria."

(The Court then dealt more specifically with questions concerning the law of trade marks, and in conclusion made an order for the inclusion in its " Repertory of Precedents " of the following rules of law which were ordered to be inserted as Rule No. 28) :

" (i) By international law foreign States are exempt from the jurisdiction of the (Austrian) courts only in so far as concerns acts undertaken by them in the exercise of their sovereign powers.

" (ii) Similarly, by municipal law, foreign States are subject to the jurisdiction of the (Austrian) courts in relation to all contentious matters arising out of legal relations pertaining to the realm of private law."

[Report : *ÖJZ*, 5 (1950), p. 341, No. 356.]

(c) PUBLIC SHIPS AND OTHER PROPERTY OF FOREIGN STATES

Jurisdiction—Exemption from—Vessels—Vessels in Ownership, Possession or Use of a State—Ship Registered in Occupied Territory and Requisitioned by Occupying Power—Ship Causing Damage to Property—Right of Owner of Property to Claim Maritime Lien—Whether Lien Attaches to Ship Used for State Purposes or Commercial Purposes. **Case No. 42**

FREDRIKSTAD HAVNEVESEN *v.* A/S BERTELSENS MEK. VERKSTED.

Norway, Supreme Court. November 12, 1949.

THE FACTS.—The Bertelsen Shipyard, respondents herein and plaintiffs in the Court of first instance, were the owners of certain port installations at the port of Fredrikstad, in Norway. The *Fredrikstad,* a ship owned by the appellants (defendants in the Court of first instance) and requisitioned by the Germans who were then in occupation of Norway, collided with and damaged some of the respondents' port installations. The Court of first instance and the Court of Appeal held that the respondents were entitled to claim a maritime lien in the appellants' ship, notwithstanding that the latter was being used as an ice-breaker in the service of the German Navy at the time of the collision. On appeal to the Supreme Court it was contended on behalf of the appellants that a ship used by the Occupying Power for State purposes—as was the case here—could never be subject to a maritime lien. On behalf of the respondents it was contended that irrespective of the user to which a ship was put, a lien could attach, on the ground that such lien became capable of execution at the moment when the ship reverted to the possession of the owner.

Held : that the ship had been used for State purposes at the time of the collision, and that as execution could not be levied against ships so used, a maritime lien could not attach to them ; that, accordingly, the appeal must be allowed. The Court said :

" What is of interest in the present case is the distinction between public ships being used exclusively for State purposes and other ships. It seems clear that the *Fredrikstad* was in the former category. It was requisitioned by the German authorities in accordance with international law. It assisted naval craft, hauled barges with supplies for the German troops in Norway and worked as an ice breaker as directed by the Germans. The fact that the crew were Norwegians and not under military command, that the ship carried Norwegian ship's papers, and that the Germans let the ship sail under the Norwegian flag cannot be of decisive importance as supporting the opposite view. The maritime lien is chiefly of interest as a basis of forced execution, and as execution cannot be effected

Case No. 42 *Contd.*

against such ships, the most natural construction seems to be that a maritime lien cannot be acquired. It has been contended that a maritime lien can be acquired against State ships, and that the lien can remain on the vessel and can be executed when the vessel reverts to private hands. I do not believe that this solution can be accepted, and I also find that the short period of limitation for which the maritime code provides militates against a right of this kind being held for an indefinite period of time."

[Report: *Norsk Retstidende*, 1949, p. 881.[1]]

Case No. 43

Foreign States—Immunity from Jurisdiction—Government-owned Vessel Engaged in Trade—Submission to Jurisdiction in Instrument of Hypothecation—Whether Sufficient to Ground the Jurisdiction of the Court—Implied Waiver—The Law of Australia.

UNITED STATES OF AMERICA *v.* REPUBLIC OF CHINA.

Australia, Supreme Court of Queensland.
(Philip J.)
February 10, 14, 1950.

THE FACTS.—On February 3, 1950, the United States of America issued a writ of summons, claiming enforcement of a mortgage, against the *Union Star*, a ship owned by the National Government of the Republic of China. On the same day the plaintiff applied *ex parte* to a judge for the appointment of a receiver for the ship. The application was granted, the receiver being appointed until February 10, 1950. Notice of the writ and proceedings was given to the Consul of the National Government of the Republic of China in Brisbane. He entered a conditional appearance denying the jurisdiction of the Court, as the proceedings impleaded a foreign sovereign State without its consent. He requested that all proceedings be set aside. A certificate from the Australian Minister of State for External Affairs was produced in Court, stating that the Government of Australia recognized the National Government of the Republic of China as the lawful Government of China.

For the plaintiff it was argued that the Republic of China had waived its immunity as the instrument of hypothecation provided, *inter alia,* that the buyer agreed to submit to a court of law, equity or admiralty, and further agreed that in a suit by the seller against the buyer, in the event of the buyer's default, the plaintiff should be entitled as a matter of right, and not as a matter of discretion, to the appointment of a receiver and to an order for the sale and disposal of the vessel. In the alternative it was argued that the doctrine of sovereign immunity did not apply to State-owned ships engaged in trade.

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[1] In *A/S Irania under Public Administration* v. *A/S Franmaes mek. Verksted*, (1950) N.D.S. 181, on the other hand, it was held by the Court of Appeal that a Norwegian ship requisitioned by the German authorities while Norway was under German occupation could be detained by a Norwegian shipyard which had carried out repairs on the ship on the order of the German authorities, the latter having failed to pay for the repairs. The ship in question was found not to have been used "exclusively on governmental and non-commercial service", as provided in Article 3 of the Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, of April 10, 1926, having been employed, *inter alia*, for the transport of edible fats to merchants in Norway.

Held : that the proceedings must be stayed as they impleaded a foreign sovereign State.

I. State-owned Ships Engaged in Trade. Application of the Doctrine of Sovereign Immunity.—The Judge declared: "It is to my mind clear law that no action or other proceeding can be taken in the Courts of this country against a foreign sovereign state, and it is generally accepted that the property of the foreign sovereign state cannot be seized or arrested, but there is some doubt whether the principle applies to a ship which is engaged merely in commerce. . . .

"Mr. O'Sullivan (for the plaintiff) argued that the immunity from being impleaded does not apply to a claim in respect of a ship of a foreign state, when the ship as is alleged here, is a trading ship, and he relies on various dicta of some of the judges in *The Cristina* case[1] (*Compañía Naviera Vascongado* v. *s.s. Cristina,* (1938), A.C. 485). But when carefully read all that is said in those dicta is that in certain cases the Court has jurisdiction even though a foreign state is interested in the proceedings but refuses to consent to the jurisdiction. Thus in the administration of a trust fund the Court has jurisdiction, even though a foreign state is interested and does not consent to be made a party. But of course in such a case there would be parties to the proceedings other than the foreign state. Lord Wright in *The Cristina* case, at p. 506, instances some of the exceptions from the general rule. Lord Maugham thought that by analogy to those exceptions the Court has jurisdiction in an admiralty action *in rem* when the ship of a foreign state is a trading ship, but he confined the exception to the general rule to proceedings against ships. (See his remarks at p. 520.) In such a case, as Lord Maugham had in mind, the ship itself would be a defendant and the foreign state could come into or stay out of the jurisdiction as it chose, but in any event the proceedings could go on in respect of the defendant ship and any other defendant who appeared. The action before me is not an admiralty action *in rem* and in my opinion is in no sense an action *in rem*. . . ."

II. Submission to the Jurisdiction by a Foreign Sovereign. Implied Waiver. Time at which such Submission must take place.—The Judge continued: "A further point has been

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[1] See *Annual Digest,* 1938–1940, Case No. 86, p 250.

Case No. 43 *Contd.* raised arising from the terms of a copy of the instrument of hypothecation which has been produced before me. In that instrument it appears that the Republic of China contracted with the United States that certain legal action might be taken in respect of this ship by the United States. At p. 10 the Republic of China agrees with the United States that in certain circumstances the United States may bring a suit at law in equity or in admiralty as it may be advised and recover judgement for any of the amounts due and later on the instrument gives authority to the United States to take action in Courts for a decree for a receiver and for other purposes. It is argued from this that by this instrument the Republic of China has consented to the jurisdiction of this Court, but in my opinion this is not so. The agreement between the United States and the Republic of China as set out in the instrument of hypothecation is at the most an agreement that the Republic of China will consent to the jurisdiction of any Court in the world in respect of the instrument. But this is merely an agreement between these two parties. Before a foreign state can be called upon to elect, there must be *in esse* a proceeding against it, and it is not until a proceeding in the Court has been brought against it that it is put to its election. Despite any contract it may have made with a third person it is under no duty to elect until it has notice of the proceedings against it and its right to refuse to consent is unhampered by any contract it may have made to consent. I think that what was said in *Duff Development Co.* v. *Kelantan*[1] ((1924), A.C. 707), by Viscount Cave at pp. 809 & 810, and Lord Sumner at p. 829, expresses the law on this point.

"In all the circumstances then I will order that the writ and all the proceedings and orders thereunder be set aside. . . ."

[Report: (1950), Queensland Weekly Notes, 5.]

Case No. 44 **Jurisdictional Immunity—Government-Owned Vessels Engaged in Trade—Effect of Possession by Foreign Government—The Law of Singapore.**

The Hai Hsuan.

United States of America *v.* Yong Soon Ee and Another.

Singapore, High Court. (Murray-Aynsley C.J.)
March 28, 1950.

The Facts.—The *Hai Hsuan* was a ship registered in Formosa. She appears to have been owned by the Nationalist Government of China, and did not at any time enter the territorial waters of the Chinese mainland after the so-called People's Republic of China had gained full control of it. At the time of the action that Government, which was recognized by a number of States, including the United Kingdom, was not recognized by the U.S.A. The United States claimed the vessel by virtue of an hypothecation in its favour. An injunction was obtained to restrain the acting Captain and the third officer from taking the vessel out of port. The defendants moved to have the writ set aside. They claimed that the *Hai Hsuan* was the property of a foreign sovereign State, the People's Republic of China, on whose behalf they had possession of the ship and that any legal proceedings against the vessel would therefore implead a foreign sovereign. The plaintiffs argued that there was no sovereign immunity in respect of merchant ships engaged in trade.

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[1] See *Annual Digest*, 1923–1924, Case No. 65, p. 124.

Held : that the proceedings must be set aside as they impleaded a foreign sovereign State. The Court said :

" By consent the parties agreed to be bound by certain answers given by the Foreign Office to the Supreme Court of Hong Kong. By those answers it is clear that ' The Central People's Government of the People's Republic of China ' is recognised both *de facto* and *de jure* as the only Government of China.

" The ship is registered in Formosa, which is legally part of the Japanese Empire and not apparently *de facto* under the control of the recognised Government of China. The defendants claim that the ship is the property of the present Government of China. They base this claim on two grounds, that it was part of the property of the former Government of China, and as such property would pass to the present Government from the moment of recognition. They also claim the property as the result of legislative act of the present Government. It is admitted that the ship has not been at any material time within the territorial waters of China. The defendants also claim that the present Government is in possession of the ship by reason of the fact that they, the defendants, are holding the ship on behalf of that Government.

" I am not satisfied at the moment that the ship was the property of the former Government as distinct from a corporation wholly or almost wholly owned by that Government. I express no opinion as to the effect of the legislation of the Government of China on the ownership of property outside China.

" On the ground of possession, I consider that the matter is concluded by the case of *The Cristina* (1938) A.C. 485. There a ship whilst absent from the territory of a state was the object of a decree of requisition by the Government of that state. Whilst the ship was in British territory the Government of that state, apparently quite illegally, obtained possession

Case No. 44 *Contd.* of that ship by putting on board a crew that was willing to hold it on behalf of that Government. The House of Lords affirmed a decision setting aside a writ and subsequent proceedings on the part of the owners on the ground that the possession was that of a sovereign state. The decision appears to be based entirely on the *de facto* possession by a crew in sympathy with the Government and of the crew I suppose that only the sympathies of the captain were material. The learned Lords were, I take it, all of the opinion that the legality or otherwise of the acts which led to possession were immaterial. Further, I do not consider that the decision is any authority on the effect of requisition by a foreign state of property without its jurisdiction. Juristically requisition would be in the same position as confiscation for this purpose. The case of *The Jupiter* (1924) P. 236 was expressly approved.

" This is enough to decide the present case except for one matter raised by Mr. Smith for the plaintiffs. That matter was the proposition that the immunity did not apply to merchant ships engaged in earning freight. It is true that three Lords reserved their opinion on that point in *The Cristina.* If they had any serious doubts on that point they might have applied them, because the *Cristina* was a commercial ship seized in the course of a commercial voyage and which the Government concerned had no opportunity of using for any other purpose, and there the supposition that it was intended to use the ship for any other purpose is only based on conjecture. The reasoning on which all the cases have been decided does not logically have room for any exception of this kind. If this result is inconvenient it can only be obviated by statute.

" I think that the result would be the same in the case of any other kind of property and does not depend on the fact that the property in question is a ship and does not depend on the form of procedure adopted by the plaintiffs. The only relevant consideration is the fact that if these proceedings were successful they would have the effect of depriving the present Government of China of possession.

" The writ and subsequent proceedings must be set aside. . . ."

[Report : M.L.R., 1950, p. 63.]

States—Immunity from Jurisdiction—State-Owned Property Abroad in Possession of *De Facto* Government—Illegality of Possession by Local Law—Relevance of—Immunity of—Irrelevance of Purpose to which Property is put—Date of Possession—Attempted Sale of the Property by the *De Jure* Government—Effect of—Subsequent *De Jure* Recognition of the *De Facto* Government—Effect of—Statements of the Executive in the Matter of Recognition. **Case No. 45**

CIVIL AIR TRANSPORT INCORPORATED (APPELLANTS) *v.*
CLAIRE LEE CHENNAULT AND WHITING WILLAUER
(1ST RESPONDENTS) AND H. C. WANG AND OTHERS
(2ND RESPONDENTS AND THIRD PARTIES).

Hong Kong, Supreme Court, Appellate Jurisdiction.
(Williams, Acting C.J. ; Gould and Scholes JJ.) (Full Court.)
May 13, 1950.

THE FACTS.—The full Supreme Court of Hong Kong, sitting in its appellate capacity, heard this joint appeal from two judgments of Sir Leslie Gibson C.J. The plaintiff in each action was a United States Corporation, known as Civil Air Transport Incorporated. The defendants in both were General Chennault and Mr. Willauer. The actions concerned the assets in Hong Kong of the China National Aviation Corporation (C.N.A.C.), a corporation incorporated in China, and the Central Air Transport Corporation (C.A.T.C.), a department of the Government of China. These assets were alleged to have been sold on December 12, 1949, by C.N.A.C. and C.A.T.C. respectively to the defendants and resold by them to the plaintiffs on or about December 18, 1949. The claim in each case was for the delivery up of these assets and damages for wrongful detention. The defendants, prior to these applications for receivers, issued on each writ a third party notice to certain persons (a different group in each case) claiming to be indemnified by them in respect of the claim of the plaintiff corporation to damages, on the ground that the third parties had prevented the defendants from giving delivery of the assets. The defendants in each action consented to the appointment of receivers, but the third parties opposed the appointment, on the ground that it impleaded a foreign sovereign (the People's Republic of China), and the appeal was argued on behalf of the plaintiffs and of the third parties.

The relevant facts and events preceding the case are of considerable complexity, and the summary that follows is taken from the judgment of Williams, Acting C.J. (quoting Sir Leslie Gibson in the lower Court) :

"The C.N.A.C. was incorporated in China in 1945, in pursuance of an Agreement dated 21st December, 1945, and made between the Ministry of Communications of the Nationalist

Case No. 45 *Contd.*

Government and Pan American Airways Corporation. It is governed by a Memorandum and Articles of Association. Article 33 of this document provides that anything not included in the Articles shall be dealt with in accordance with the company law governing limited companies and with the Agreement. Article 2 sets out the main purpose of the corporation in general terms but Article V section 1 of the Agreement requires the corporation, so long as the Agreement is in force, to operate on certain specific air routes within China. Article 3 of the Memorandum and Articles says that the head office is at Shanghai. Article 5 provides that the Ministry of Communications is to subscribe for 80% of the shares and Pan American Airways the remaining 20%. The shares are to be registered and are not to be transferable except in accordance with the Agreement. Article IX section 2 of the Agreement deals with the transfer of shares, but I have only the English version of the Agreement in evidence (although it is stated in the Agreement that the Chinese version is authoritative) and I find myself in a difficulty in construing this provision. By Article 13 of the Memorandum and Articles, the corporation is to have nine directors—seven of them nominated by the Ministry of Communications, and two by Pan American Airways with the approval of a shareholder's meeting. Under Article 17, important contracts are to be approved by the Board of Directors.

" The corporation naturally felt the impact of the civil war in China. In May 1949 Shanghai was captured by the forces of General Mao Tse-tung and on the 1st October, 1949, the Central People's Government was proclaimed as the Government of China. By that date it was in effective control of the whole Chinese mainland with the exception of five provinces. On that date, the Central People's Government purported to dismiss the former Nationalist Ministers and appointed new ones. Some time after the fall of Kweilin and Chungking in October, the Nationalist Government established itself in Formosa. The result of these events was that a number of the planes and a lot of the equipment of C.N.A.C. were moved to Hong Kong for safety and the directors apparently used Hong Kong as the Company's headquarters.

" In October, 1949, an effective majority of the C.N.A.C. employees in Hong Kong, whose sympathies were apparently with the Central People's Government, declined to recognise the authority of the directors who were nominees of the Nationalist Government and Pan American Airways and, as a consequence, an action (O.J. Action No. 517 of 1949) was started against certain of them in the name of C.N.A.C. Certain directors were dismissed and new ones appointed and the employees were suspended until they could be vetted as to their sympathies. As a consequence also, the Nationalist

Government grounded the aircraft in Hong Kong by suspending their certificates of registration. Interim injunctions were obtained and have remained in force by consent, which are designed, *inter alia*, to prevent the removal of the assets of C.N.A.C. from Hong Kong.

"On 5th December, 1949, the defendants in the present action wrote a letter to the Nationalist Ministry of Communications in Formosa offering to purchase all the assets of C.N.A.C. and C.A.T.C. (an unincorporated body which was a department of the Nationalist Government and also operated an airline), and also the shares of the Nationalist Government in C.N.A.C. and C.A.T.C. In view of the status of C.A.T.C. there were not, of course, any shares in it to be affected by this offer. The letter makes it clear that the object was to prevent the assets and shares falling into Communist hands. It fixes the price of C.N.A.C. assets at U.S. $1,500,000 and of C.A.T.C. at U.S. $2,000,000. No prices are mentioned for the shares. The defendants offer to issue promissory notes for the two sums above to C.N.A.C. and C.A.T.C. and to undertake to cause a corporation to be formed (the present plaintiff corporation) to take over the assets and shares and issue promissory notes in substitution for those to be issued by the defendants. On this letter are endorsements stating that the terms are accepted and approved—one dated 13th December, 1949, by Nih Chun-sung as Deputy Secretary-General of the Executive Yuan and concurrently Chairman of the Board of Directors of C.N.A.C. and the other dated 12th December, 1949, signed by Liu Shao-ting as Vice-Minister of Communications and concurrently Chairman of the Board of Directors of C.A.T.C. On 12th December, 1949, Mr. Yen Hsi-shan wrote as Nationalist Premier to the defendants from Formosa accepting their offer. On 19th December, 1949, the defendants purported to sell the assets of C.N.A.C. and C.A.T.C. to the plaintiff corporation. On 31st December, 1949, a meeting of directors is alleged to have taken place in Hong Kong at which resolutions were passed approving the action of the Government in accepting the offer of the defendants, ratifying acceptance of the offer by the endorsement of 13th December, 1949, approving the assignment of the assets by the defendants to the plaintiff corporation, and authorising the Nationalist Government to sell to defendants for transfer to the plaintiff corporation for U.S. $1,250,000 the 20% shares previously held by Pan American Airways. The record of the meeting recites that the Nationalist Government had purchased the shares. On the same day, a meeting of the old shareholders was held in Hong Kong and was attended by representatives of the Nationalist Government and by Mr. Willauer as the representative of the defendant partnership. Mr. Willauer attended 'so that the ratification would be communicated to an authorised representative of the

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partnership'. The record of it states that the acceptance by the Nationalist Government of the defendant's offer is approved and all actions of the directors at the meeting are ratified.

" While these things were happening in Formosa and Hong Kong, the Central People's Government was taking certain action in China in relation to C.N.A.C. Its Minister of Communications purported to appoint Mr. Ching Yi Liu as Managing Director and to nominate six other directors—presumably in place of those previously nominated by the Nationalist Government. The dates of these purported nominations are not stated but that of Mr. Ching Yi Liu was on some date prior to 12th November, 1949. These directors purported to maintain the head office at Shanghai until 10th January, 1950, when it was moved to Tientsin. On 12th November, 1949, the Premier of the Central People's Government gave certain oral instructions to Mr. Ching Yi Liu and addressed a communication to him and the officers and workmen of C.N.A.C. The oral instructions were to take control of the properties and assets and employ them for the transport of passengers, mail and cargo by air. The letter declares the C.N.A.C. to be the property of the Central People's Government and under its control and appoints Mr. Ching Yi Liu to be General Manager of C.N.A.C. It expresses the hope that all officers and workmen of the corporation in Hong Kong will unite under General Manager Liu to protect the assets pending further instructions. On 13th January, 1950, Mr. Chung Chik Ping, as head of the Civil Aviation Bureau of the Central People's Government, issued further instructions to Mr. Ching Yi Liu to take over the assets of C.N.A.C. As from November 15th, 1949, the Central People's Government has paid the wages of the Hong Kong employees of the corporation."

The facts concerning the assets of C.A.T.C. are similar. The General Manager, Mr. Chen Cheuk Lin, went over to the Communists some time in 1949, and he visited Peking in November of that year to obtain instructions from the Central People's Government. In his statement to the Court Mr. Lin declared : " Acting under my instructions and in continuous communication with me the senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and absolute possession and control in every respect of all the assets, properties, aircraft and real estate belonging to the Corporation. I say that I gave the said instructions and orders for and on behalf of the Central People's Government. I further say that the wages of all the employees and staff from the 15th November, 1949, have been paid by the Central People's Government."

On November 12, 1949, the position of Mr. Chen Cheuk Lin as General Manager of C.A.T.C. was affirmed by the Prime Minister of the Central People's Government.

The appellants did not deny that the assets in both actions were in the hands of people claiming to hold them on behalf of a foreign Government, but argued, on several grounds, that sovereign immunity did not apply in this case. It was contended that no immunity was granted to property not dedicated to public uses; that the Central People's Government was not recognized *de jure* at the time of the issue of the writ and thus not entitled to claim immunity; and that the possession of the Central People's Government was in contravention of local law and was not, therefore, of any avail to them in raising a plea of immunity.

Sir Leslie Gibson, sitting as the Supreme Court of Hong Kong, dismissed the action for reasons substantially the same as those in the judgment of the Court of Appeal.

On appeal,

Held: (*per* Williams, Acting C.J.) that the appeals must be dismissed as the proceedings impleaded a foreign sovereign State; that it was immaterial to what use the property was put for which immunity was sought; that the important date for possession of property when immunity was claimed was the time at which the action was brought, not the date when the writ was issued; and that the illegality of the possession under local law was irrelevant as far as the plea of sovereign immunity was concerned. The Court also indicated that it would have dismissed the appeals on the ground that the appellants had not made out a sufficient prima facie case.

I. *Recognition. Statement by the Executive on the Recognition of Foreign Governments.*—The Court said: "The third parties having objected to the applications on the ground that the appointment of a receiver violated the sovereign immunity of the Central People's Government of China, the Court adopted the usual practice and obtained the answers of H.M. Government to an agreed questionnaire on the subject of the *de jure* and *de facto* recognition of that Government. They are as follows:

'(1) H.M. Government in the U.K. does not recognize Nationalist Government (Republic Government) as *de jure* Government of the Republic of China.

'(2) Up to and including midnight January 5th/January 6th, 1950, H.M. Government recognized Nationalist Government as being *de jure* Government of Republic of China and as from midnight January 5th/January 6th, 1950, H.M. Government ceased to recognize former Nationalist Government as being *de jure* Government of Republic of China.

'(3) As from midnight of January 5th/6th, 1950, H.M. Government recognized Central People's Government as *de jure* Government of Republic of China.

'(4) H.M. Government recognize Nationalist Government has ceased to be *de facto* Government of Republic of China. It ceased to be *de facto* Government of different parts of the territories of Republic of China as from dates on which it ceased to be in effective control of those parts.

'(5) H.M. Government does not recognize any governments other than Central People's Government as *de facto* Government of Republic of China. Attention, however, is invited to the second sentence in answer to question 4.

'(6) In 1943 Formosa was part of the territories of Japanese Empire and H.M. Government consider Formosa is still *de jure* part of that territory. On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-Shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to Republic of China. On July 26th, 1945, at Potsdam, the heads of the Government of United States of America, the United Kingdom and Republic of China reaffirmed "The terms of the Cairo Declaration shall be carried out". On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied powers concerning Japanese forces in Formosa surrendered to Chiang Kai-Shek. Thereupon, with the consent of the Allied Power Administration, Formosa was undertaken by the Government of Republic of China. At present, actual administration of the island is by Wu Kuo Cheng, who has not, as far as H.M. Government are aware, repudiated superior authority of Nationalist Government.

'I am advised that the effect of recognition by H.M. Government as stated in answer to questions 1 to 5 and in particular its retroactive effect if any are questions for court to decide in the light of those answers and of evidence before it . . .'

"On the above facts and on this statement from H.M. Government, the learned Chief Justice held that the doctrine of sovereign immunity operated so as to prevent the Court from appointing a receiver. He held that the Central People's Government of China was in possession or control of the assets in question and that the cases therefore fell within the second principle enunciated by Atkin L.J. in *The s.s. Cristina* [1] ((1938), A.C. 485 at p. 490): 'The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control'.

"The basis of this finding was that actual possession and control was held by persons purporting and intending to act on behalf of the Central People's Government and an intention by the latter to possess and control through those persons evidenced by the directives mentioned above. At the hearing of the appeal, a number of submissions were made against the correctness of this finding which we will now enumerate and consider."

II. *Immunity of State-Owned Property. Irrelevance of the Purposes for which that Property is Used.*—"The first is that the property concerned is not of the type upon which a plea of immunity can be based as it is not dedicated to public uses. The question has arisen previously in connection with trading vessels and there has been some difference of opinion as to whether immunity can be claimed in respect of vessels which though publicly owned are exclusively used for trading purposes. In *The Porto Alexandre* [1] ((1920) P. 30), the Court of Appeal, following the decision in *The Parlement Belge* (5 P.D. 197), held that the doctrine did apply to such cases. In *The s.s. Cristina*,[2] Lords Thankerton, Macmillan and Maugham doubted the correctness of this decision and reserved their opinions on it. In the decision now appealed from, the learned Chief Justice considered that the law was settled by the decisions in *The Porto Alexandre* [2] and *The Parlement Belge* [2] and quoted the firm opinion of Lord Wright in *The s.s. Cristina* [2] summarized at pages 510 and 511 of the report. We are disposed to consider that the learned Chief Justice was correct in the view he took but, even if he were not, we think that the claim of the assets in the present case to be considered as dedicated to public purposes is far stronger than it was in any of the cases above mentioned. They are essential and substantial parts of airlines used for the carriage of passengers, mails and freight in the interior of China. Particularly in a country of vast area, still backward in development so far as roads and railroads are concerned, such services are of immense importance and serve, in our opinion, essentially a public purpose."

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[1] See *Annual Digest*, 1938–1940, Case No. 86.

III. *Parties to the Dispute. Basis of a Claim to Sovereign Immunity.*—"Counsel for the appellants next sought to draw a distinction between the present case and those previously decided on the question of sovereign immunity. The latter, he contended, were all litigated either between British interests or nationals and a foreign state, or between the subjects of a foreign state and the government thereof. The present instance is the first where a British Court is being asked to decide a dispute between claimants from one foreign country (the United States of America) and the government of another. In our opinion, whether that be so or not, the distinction has no bearing whatever on the principles being applied. The doctrine of immunity arises from the independent status of the foreign sovereign or country against which, or against property in the ownership or possession of which, our courts are asked to act. The sovereign status, once recognized by H.M. Government *de jure* or *de facto*, is not affected by the identity of the person who seeks the aid of the Court."

IV. *The Date on which a Foreign Government must be in Possession of Property for which Immunity is Claimed, if the Claim to Immunity is to Succeed.*—"A further distinction

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[1] See *Annual Digest*, 1919–1922, Case No. 100.

[2] See above.

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sought to be made on behalf of the appellants was that in previous cases the foreign government had possession or control of the property in question before the writ in the action was issued; the present action was commenced before recognition by H.M. Government of the Central People's Government; the writ was issued on the 5th January and recognition took place at midnight on the 5th–6th January: the transaction under which the plaintiffs claim title was completed, it was submitted, before the third parties or other persons in actual control had any right to claim possession on behalf of the Central People's Government: the assets concerned were in Hong Kong and not in any area of which the Central People's Government was recognized as the *de facto* Government; that Government had no standing as regards property in Hong Kong until recognition. Apart from any question of the effect of *de jure* recognition, and apart from the question of the domicil of the assets in relation to *de facto* recognition, the argument lacks validity. It may be answered simply by saying that the Central People's Government, being recognized as the *de facto* Government of large areas of China prior to the issue of the writ and prior to the 12th December, 1949, was entitled to the benefit of the doctrine of immunity. There is ample authority for that proposition and the case of *The Arantzazu Mendi* [1] ((1939), A.C. 256), provides an example. That being so, if actual possession was claimed and held on behalf of that Government, that is an end of the matter, and this Court has no jurisdiction. The argument seems to confuse actual possession with the right to it. It fails also from this point of view, that the important date is not so much the issue of the writ as the date when the claim to immunity is made. In *The s.s. Cristina*,[2] Lord Wright said (at page 506 of the report): 'It is unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it had possession at the time when the claim to immunity is made.'

"The present action was brought by a United States corporation against two United States citizens: it is a personal action and only became a concern of the Central People's Government when action was taken which threatened interference with the assets themselves, *i.e.* when applications were made for the appointment of receivers. It was then that the claim to immunity was made and the Court is concerned to enquire whether the claim is supported by possession at that time and since."

V. *Irrelevance of the Illegality of the Possession of Property for which Sovereign Immunity is Claimed.*—"Finally counsel relied on section 3 of the Representation of Foreign Powers (Control) Ordinance, 1949, which is as follows:

"'(3) No person shall function on behalf of any foreign power without the consent of the Governor: Provided that this section shall not apply—

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[1] See *Annual Digest*, 1938–1940, Case No. 25.

[2] See above.

(*a*) to the accredited representative of any foreign state;
(*b*) to any person exempted by order of the Governor:
(*c*) to such members of the staff or an accredited representative as are in possession of a valid and subsisting certificate of exemption.'

" By section 2 ' function ' means to perform any act or do anything. He submitted that though the third parties were doing all they could to function as agents of the Central People's Government, they could not do as they purported to do without first taking the steps laid down in the Ordinance, and that thus they only functioned on behalf of themselves. In support of this argument he quoted the *9th Edition of Maxwell on the Interpretation of Statutes* at page 152 and paragraphs 658, 659 and 748 of Volume 31 of *Halsbury's Laws of England, Hailsham Edition*. He also pointed out that to contravene section 3 of this Ordinance was an offence for which penalties were provided under section 7 of the same Ordinance.

" In respect of this argument, the learned Chief Justice at page 11 of his judgement says this:

> ' Then it is said that the Government is effecting its possession through persons who are in contempt of the injunctions in O.J. Action No. 517 of 1949 and are transgressing the prohibition contained in the Representation of Foreign Powers (Control) Ordinance, 1949. It does not seem to me that the Government has to rely for its possession on the actions of persons in contempt (if such there be) and the general answer to this submission seems to me to be that which I have already dealt with, namely that, when a question of sovereign immunity based on *de facto* possession is raised, the Court is not concerned to enquire whether the possession is valid under municipal law. I think there is another answer. A statute is to be construed, as far as its language permits, on the presumption that the legislature did not intend any inconsistency with international law as recognised by the Courts and the presumption will only be held to be rebutted where the intention of the legislature in favour of such inconsistency is clearly expressed. (*Maxwell*, 9th Edition, p. 152.) The doctrine of sovereign immunity is a fundamental doctrine of international law based on the most cogent practical considerations amounting almost to necessity, and the legislature has not expressed a clear intention to exclude it by the Ordinance. There is plenty of scope for the operation of the Ordinance even though the doctrine of sovereign immunity is left untouched by it.'

We think that what the learned Chief Justice there said is correct.

" The passage already quoted from the opinion of Lord Wright in *The s.s. Cristina* [1] is again relevant in this connection:

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[1] See above.

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" ' It is unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it had possession at the time when the claim to immunity was made ' ; and again at page 509 he says :

" ' This gives the sovereign, so far as it concerns Courts of law, an immunity even in respect of conduct in breach of the municipal law. The remedy, if any, is prima facie by diplomatic representation or other action between sovereign States, not by litigation in municipal courts.' We think that what he there says is clear and means what it says. Lord Maugham in the same case at page 515 says this :

" ' But it seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of a right. . . .'; and again at page 516 he says :

" ' If the foreign Government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.' At page 493 in the same case, Lord Atkin, having found that the doctrine of sovereign immunity applied said that it was therefore unnecessary to decide whether the ship was rightly in the possession of the foreign Government.

" We are unable to find in any of these submissions any ground for holding that the learned Chief Justice was wrong in deciding that the doctrine of sovereign immunity precluded the Court from entertaining an application to appoint receivers : on the contrary we are in accord with his finding and the reasoning upon which it was based. . . ."

VI. *Effect of a Sale of State Property Abroad by a* De Jure *Government when the* De Facto *Government is in Illegal Control of that Property.*—" In his decision, the learned Chief Justice indicated that apart from any question of sovereign immunity he would have refused the appointment of a receiver on the ground that in his opinion the plaintiff corporation had not established a sufficient prima facie case. In order to succeed, a plaintiff must show that there is a reasonable likelihood of his winning the case when the action comes on for trial. . . . In our opinion, the learned Chief Justice was correct in his view also of this aspect of the case. We do not wish, at this stage, to say anything which might be prejudicial at the trial of any issue and will do no more than indicate some of the difficulties which in our opinion the plaintiff corporation must surmount.

" The title asserted by the appellants to the property is based on the offer made by General Chennault and Mr. Willauer in their letter of the 5th December, 1949, addressed to the

Minister of Communications of the Nationalist Government of China, Taipeh, Taiwan, followed by its acceptance. The details of this letter are sufficiently set out in the statement of facts quoted above from the judgement of the learned Chief Justice. It is to be observed that the Nationalist Government agreed to cause the said C.A.T.C. and C.N.A.C. to sell all of the physical assets and such stock as was then owned by the Government. On the 12th December, 1949, Mr. Yen Hsi-shan, as Nationalist Premier, wrote to General Chennault and Mr. Willauer accepting the offer.

" The appellants referred to *Oppenheim*, Vol. I, p. 155 (*d*), where this passage occurs : ' There is a considerable body of authority among text-writers in favour of the view that the absorbing State is bound by the contracts of the extinct State ' ; and also to a passage in *Hyde on International Law*, Vol. 1 (2nd Edition) at page 185, and contended that this principle was now followed in our Courts. They relied on *Bogusławski* v. *Gdynia-Ameryka Linie* ((1950), 1 K.B. 157)[1] in support of their argument ; that case was authority for the proposition that a contract made by a *de jure* government as regards property situated outside the *de facto* territory was binding on the *de facto* Government. The decision of Bennett J. in *Haile Selassie* v. *Cable and Wireless Ltd.* ((1938), 3 A.E.R. 677)[2] was relied upon on the subject of the authority of the *de jure* Government over property outside the area controlled by the *de facto* Government. The appellants contended that the contract of the 12th December, 1949, was one for the sale of goods and that the property in them had passed before the Nationalist Government had ceased to be recognised as the *de jure* government. A further submission was that the dealing with the property was an Act of State of the Nationalist Government which could not be enquired into by a foreign court (*Luther* v. *Sagor*,[3] (1921), 3 K.B. 532).

" It is necessary to bear in mind what property the agreement to sell purported to affect. C.A.T.C. is admittedly a Government Department and its assets are public assets of the Republic of China. According to an affirmation before the Court, its aeroplanes and spare parts in Hong Kong formed the most valuable portion of its assets but it still had property valued at H.K. $6,000,000 in China and a radio station in Formosa valued at H.K. $450,000. As to the C.N.A.C., it is a corporation and by its constitution it is provided that the head office shall be at Shanghai. It was originally incorporated in China in 1945 as a civil aviation enterprise in pursuance of an agreement dated the 21st December 1945 between the Minister of Communications of the Nationalist Government

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[1] See *Annual Digest*, 1949, Case No. 20.
[2] *Ibid.* 1938–1940, Case No. 67.
[3] *Ibid.* 1919–1922, Case No. 26.

Case No. 45 *Contd.* and Pan American Airways. It made provision, *inter alia*, for the operation of an effective air transport on eight routes in China, for the carriage of all classes of mail, passengers and baggage. Provision was also made for the gradual building up of an effective air service throughout China, and also from there to various parts of the world by training the necessary pilots, navigators, radio operators, etc. The Chinese Government, under the Memorandum and Articles and the Agreement, had the right to transfer its holding of shares from the Communications Department to any other department of the Government but not to any other transferee. The Agreement is to be binding on the lawful successors of both parties. At its expiry, the Government has the right to acquire the shares held by the Pan American Airways for a money consideration. Meanwhile, it was assured of control by certain provisions empowering it to appoint effective majorities at directors' and shareholders' meetings. It is clear and has not been disputed that, at the time of the purported sale to General Chennault and Mr. Willauer, at least 80% of the shares of C.N.A.C. was held by the Government on behalf of the people of the Republic of China.

" On the 1st October, 1949, the Central People's Government purported to dismiss the former Ministers of the Nationalist Government and to appoint new ones. It also, at some later date, purported to dismiss all the directors of C.N.A.C. The effect of the recognition by His Majesty of the Central People's Government is that this Court will not inquire into the validity of the acts of the Central People's Government on its own territory (*Luther* v. *Sagor* (1921) 3 K.B. 532). It is immaterial on that question whether the Central People's Government had been recognized as the Government *de jure* or *de facto*. His Majesty's Government recognized that the Central People's Government was the *de facto* Government of various parts of China as and from the date *de facto* control was established in those parts. It follows that any acts done by the Nationalist Government as regards that part of China under the *de facto* control of the Central People's Government are to be regarded as a mere nullity in that area by the Courts of this country. The facts in the *Banco de Bilbao* v. *Sancha*,[1] ((1938) 2 K.B. 176), are, we consider, the nearest to the present case. There, the plaintiff bank had its corporate home in Bilbao. It was held that laws purporting to affect the bank and which had been made by the Republican Government of Spain at a time when it was no longer in *de facto* control of Bilbao must be disregarded. It is worthy of note that the decision was not affected by the removal by the officers then acting of the bank's documents and place of business to Barcelona before the fall of Bilbao. Here the Nationalist Government purported under the contract to dispose of the whole of the assets and

[1] See *Annual Digest*, 1938–1940, Case No. 29.

shares wherever situated of the C.N.A.C. which had its corporate home in Shanghai, territory under the *de facto* control of the Central People's Government, and the whole of the assets of C.A.T.C., a government department operating air services in China.

" The appellants concede that, as regards assets in the area controlled by the Central People's Government (which at the relevant time was almost the whole of China), the agreement for sale could have no effect, but say it can do so as regards assets in Hong Kong. It seems illogical to say that the agreement is binding on the Central People's Government as to some things and a nullity as regards others. Furthermore, it appears to be contrary to the principles in the *Banco de Bilbao* case [1] to say that because public assets which are domiciled in the territory controlled by the *de facto* government are temporarily outside that area (though not in an area controlled by the *de jure* Government) the *de jure* Government can effectively deal with them. Bennett J. in *Haile Selassie* v. *Cable and Wireless Ltd.*, did not touch on this question and regarded himself as ' concerned with the title to a chose in action—a debt—recoverable in England. . . .' "

VII. *Effect of* De Jure *Recognition of a Government. Succession to State Assets.*—" The next difficulty before the appellants is the effect of the *de jure* recognition of the Central People's Government. In *Haile Selassie* v. *Cable and Wireless Ltd.* ((1939) Ch. 182), the Master of the Rolls said at page 197 : ' It is not disputed that in the Courts of this country, His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further it is not disputed that the right of succession is to be dated back at any rate to the date when *de facto* recognition . . . took place.' Applying that principle to the present case, it would seem that the right of succession of the Central People's Government to these assets must be deemed to have arisen before the purported dealing with them of the 12th December, 1949. Furthermore, it has been said that all the public rights and interests of a Republic are vested in the State itself (*U.S.A.* v. *Wagner*, 2 Ch. App. Cases 582) and the Government *de facto* of the area to which the assets belonged had already purported to dismiss the officials who entered into the agreement. The purported purchasers were fully aware of the position and the agreement contained terms designed to prevent the assets falling into the hands of the Government which is now deemed to have succeeded to them before the date of the agreement. The case of *U.S.A.* v. *McRae* (L.R. 8 Eq. 69), is relevant in this connection but we do not deem it necessary to discuss it in detail.

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[1] See above.

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The *Bogusławski* case [1] does not assist the appellants in our opinion. The facts are materially different. The Lublin Government never was in *de facto* control of the Polish ships and seamen concerned. Up to the moment of recognition they were under the *de facto* control of the original Polish Government then established in London which was also recognized by His Majesty's Government as the *de jure* Government. There was therefore no scope for the ordinary rule that *de jure* recognition is deemed to be ante-dated to the commencement of effective *de facto* government of a particular area. . . .

"Upon consideration of all these matters, we have come to the conclusion that even apart from the question of sovereign immunity, a sufficient case for the appointment of a receiver has not been made out. The appeals are therefore dismissed with costs."

[Report: *Hong Kong Law Reports* (1950), Vol. xxxiv, p. 386.]

NOTE 1.—The judgment here reported was delivered on May 13, 1950. Three days earlier, on May 10, an Order-in-Council was issued to the Supreme Court of Hong Kong, conferring on it jurisdiction to hear any further action brought to obtain possession of, or to determine the ownership of, the aircraft in question. The Order stated, *inter alia*, that it should not be a bar to the jurisdiction of the Court that the action might implead a foreign sovereign State. On May 19, 1950, the appellants in the case reported above issued a writ against C.A.T.C. (no action was brought against C.N.A.C.), claiming a declaration that the aircraft were their property. The case was tried before Sir Gerald Howe C.J., sitting as the original jurisdiction of the Supreme Court of Hong Kong, and on May 21, 1951, he dismissed the claim; having regard to the Order-in-Council the question of immunity was no longer the decisive issue. Appeal was made to the Full Court, which affirmed Sir Gerald Howe's judgment. The action was finally taken to the Judicial Committee of the Privy Council, which reversed the decision (*Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1952] 2 All E.R. 733).

The judgment of the Privy Council, which will be reported in a subsequent volume, does not deal with the question of sovereign immunity, and thus does not override the material parts of the judgment here reported. The case, as it came before the Privy Council, was mainly concerned with the retroactivity of recognition. In only one relevant particular, and as a matter of recognition and not sovereign immunity, did the views of their Lordships differ from those expressed above. In the light of the Representation of Foreign Powers (Control) Ordinance, 1949, Viscount Simon stated: "In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity". In the case above reported the Supreme Court of Hong

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[1] See above.

Kong declared that the illegality of the possession was immaterial, at least as far as the question of sovereign immunity was concerned.

On the issue of the Order-in-Council to the Supreme Court of Hong Kong see "Aristeides" in *International Law Quarterly*, 3 1950), p. 150; and on the judgment of the Privy Council see the Note by Johnson in *The British Year Book of International Law*, 29 (1952), p. 464.

NOTE 2.—As the judgment of the Supreme Court, sitting in its appellate capacity, has been reported at length above, it has been considered unnecessary to note in full the opinions of Sir Leslie Gibson C.J., in the Court below. His judgments largely coincide with those of the full Court, but certain statements of interest made by him are appended below:

Civil Air Transport Incorporated (*Plaintiffs*) v. *Claire Lee Chennault and Whiting Willauer* (*Defendants*), *and H. C. Wang* (*Third Parties*). Supreme Court of Hong Kong, Original Jurisdiction (Sir Leslie Gibson C.J.), February 23, 1950. This case dealt with the assets of C.N.A.C. On the question of sovereign immunity the learned Judge stated: "The first objection raised to this application on behalf of the third parties is that the appointment of a receiver would violate the sovereign immunity of the Central People's Government of China and I will now deal with that aspect of the case. I think that I am free to do so notwithstanding that the Central People's Government is not a party to these proceedings and notwithstanding that it has made no formal claim. Sovereign immunity does not seem to me to be a privilege which must be claimed before the Courts will take notice of it, but rather a rule of law of which the Courts must take notice if the appropriate facts come to its knowledge unless there has been a submission to the jurisdiction."

On the claim by the Third Parties that the Central People's Government was the owner of the assets of C.N.A.C. Sir Leslie Gibson said: "As regards the question of ownership, there are two points I must make. The first is that a mere claim to ownership is not enough. It must be established in the ordinary way. The second is that ownership of the assets is not to be confused with ownership of the shares. Under our law, a corporation is an entity quite separate from its shareholders and the assets of a corporation are not the property of the shareholders. (*Macaura* v. *Northern Assurance Co.*, (1925) A.C. 619). It appears from the affidavits of the experts in Chinese law that the position is the same under that law.

"These things being so, I do not see how the Central People's Government can be the owner of the assets unless it is shown that ownership has passed to the Central People's Government by some form of compulsory acquisition which this Court would recognize. Mr. P. L. Lam, the expert on Chinese law on whom the third parties rely, has referred to what is known as the 'Common Programme' of the people of China under the Central People's Government which he says is the Constitution of China and has affected the nationalization of C.N.A.C. But I am unable to accept Mr. P. L. Lam as an expert on the laws of the new régime in China (his qualification as an

Case No. 45 *Contd.*

expert is three years' practice in China under the old régime) and the Common Programme was adopted before the proclamation of the Central People's Government on 1st October, 1949. Moreover, it is not clear that the Common Programme is any more than a statement of the principles to be worked out by subsequent legislation, and, even if it is legislation nationalizing a certain class of undertaking, I am not satisfied that C.N.A.C. comes within that class. Lastly, I am unable to agree that any such nationalization could be effective as regards property in Hong Kong. The claim to immunity based on ownership of the assets by the Central People's Government (as opposed to C.N.A.C. itself) therefore fails.

" I turn then to the question of possession and control. Clearly the indirect control that the Central People's Government might have as a shareholder is not enough. As Lord Maugham pointed out in the case of *The s.s. Cristina* [1] at p. 520 : ' no court has yet held that a foreign government can object to an action against a company in which it owns a number of shares '. Equally I think that the indirect control which a person who has power to nominate a director has over the vote of that director falls short of what is required. But it is suggested that in this case the matter goes further and that the Central People's Government is in possession and control to the exclusion of the corporation and is the present employer of the persons in charge of the assets in Hong Kong.

" I must now state an important difference between a claim to immunity based on ownership and a claim based on possession and control. The former requires proof of ownership in law (at least as regards assets of the type in this case) while the latter requires merely proof of possession and control *de facto*. . . ."

Sir Leslie Gibson then continued to discuss the claim to sovereign immunity based on *de facto* possession in terms similar to those of the Appeal Court.

Jurisdictional Immunity—Foreign States—Set-Off.

See Case No. 18 (*United States* v. *National City Bank of New York et Al.* ; *Steingut et Al.* v. *National City Bank of New York*).

Jurisdictional Immunity—Of Governments—In Respect of Actions Brought by the United Nations.

See Case No. 103 (*Balfour, Guthrie & Co., Limited, et Al.* v. *United States et Al.*).

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[1] See above.

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Jurisdiction—Over Nationals for Crimes Committed Abroad—Extradition of Nationals—The Law of Switzerland. **Case No. 46**

KAISER AND ATTENHOFER *v.* BASLE.

Switzerland, Federal Tribunal. October 6, 1950.

THE FACTS.—The appellants, Swiss nationals, were tried and convicted in Basle for certain crimes committed abroad. Article 2 of the Swiss Penal Code provides that Swiss nationals shall not be extradited. Article 6, paragraph 1, of the Code provides that Swiss nationals who commit an offence abroad in respect of which Swiss law permits extradition, shall be subject to the Swiss Penal Code, provided that the offence is also punishable by the law of the place where it was committed, and that the offender is found in or extradited to Switzerland. If the penalty attached to the offence by the law of the place where it was committed is less than in Switzerland, the foreign law shall be applied. It was contended on behalf of the appellants that they could only be tried if the foreign State concerned asked that criminal proceedings be taken by Switzerland.

Held : that the appeal must be rejected. Switzerland had independent authority to try its nationals for offences committed abroad. The Court said :

" The appellants contend that a State only has jurisdiction over acts committed on its territory : acts committed abroad can only be prosecuted and punished on the basis of so-called substituted criminal law. However, the *jus puniendi* is not given the State by an outside authority. Each State itself determines on what conditions persons shall be subject to its criminal law. States do not limit their jurisdiction to acts committed on their territory. Thus Switzerland claims the right to punish offences committed abroad if its interests so require, as for instance offences against the State or against Swiss nationals (Articles 4 and 5 of the Penal Code). . . . Moreover the demand of a foreign State to prosecute and punish on its behalf would not alone confer the *jus puniendi* on the Swiss State. Swiss law must authorise the Swiss authorities to try and punish. Swiss law is applicable to the case with the exception expressly provided for in Article 6, paragraph 1, of the Penal Code. The *jus puniendi* can only be based on the legal order of the State which inflicts the punishment. The positive law of that State must provide whether an offence committed abroad shall be punishable only if the foreign State concerned requests the trial of the offender. . . ."

(The Court then examined the preparatory work of Article 6 of the Penal Code and concluded that the legislature did not intend that the trial of offenders should depend upon a request from the foreign State.)

" Article 6, paragraph 2, of the Penal Code provides that an offender shall not be punishable in Switzerland if he has already been acquitted abroad, or a punishment imposed on him has been executed, remitted or prescribed. . . . This provision is influenced by the general principle that no person shall twice be prosecuted for the same offence. It would be meaningless if punishment were dependent on a request from the foreign State concerned, since no such claim would be made if the foreign State had already acquitted or convicted the offender.

" Article 2 of the Penal Code provides that Swiss nationals shall not be extradited, but that Switzerland will ensure their trial on the receipt of a request from the foreign State concerned together with an assurance that that State will not itself subsequently try the persons concerned. The purpose of the Article is to make the promise of a trial dependent on such a declaration of the foreign State, not to deprive the cantons and, at the present time, the federation of the right to punish a Swiss national for an offence committed abroad. Admittedly if there is no such request, and hence no declaration, a Swiss national might conceivably be punished a second time. But he can avoid such a result by remaining in Switzerland until the prosecution abroad is time barred.

" Article 6 only makes offences committed abroad by Swiss nationals punishable if they are offences in respect of which their law permits extradition. This is so seeing that the trial of Swiss nationals is the counterpart of their immunity from extradition. Other acts are not punished, firstly because in such a case Swiss nationals would be in a worse position than aliens who are in Switzerland—and, secondly because Switzerland has no interest in bringing them to justice. But it cannot be concluded therefrom that Switzerland is only interested in the punishment of Swiss nationals extraditable for offences committed abroad, if a request for extradition or for trial has been made. It is concerned to ensure that Switzerland does not become an asylum for criminals. This is not dependent on the action of the foreign State. The foreign State may not know the offender or of his presence in Switzerland. If Article 6 required a request from the foreign State, Switzerland would not be able to take any action, *i.e.* it would also not be able to suggest the submission of such a request. It may be noted in this connection that some States are reluctant to make such a request because they wish to retain the right to prosecute until they know that Switzerland has actually tried and punished the offender."

[Report: *Entscheidungen des schweizerischen Bundesgerichtes aus dem Jahre 1950*, Amtliche Sammlung, vol. 76, IV, p. 209 ff.]

Jurisdiction—Over Nationals for Crimes Committed Abroad—Treason Committed Abroad—" Giving Aid and Comfort to the Enemy "—The Law of the United States.

See Case No. 81 (*Gillars* v. *United States*).

C—HIGH SEAS

II.—Jurisdiction on the High Seas

Jurisdiction—On the High Seas—Offence Committed on Board Aircraft in Flight over Open Sea—Whether Courts of Country of Registration of Aircraft Competent to Exercise Jurisdiction—The Law of the United States of America. **Case No. 47**

UNITED STATES *v.* CORDOVA *ET AL.*

United States, District Court, Eastern District of New York. March 17, 1950.

THE FACTS.—The accused were passengers in a carrier plane owned by a company incorporated in the United States and under charter to another company also incorporated in that country. While the aircraft was in flight between an airport in Puerto Rico and La Guardia Field, New York, each of the accused committed an assault upon the other, and the first accused, in addition, assaulted two members of the crew. It was established beyond doubt that the assaults were committed while the aircraft was in flight over the open sea. On arrival at New York the accused were taken into custody and subsequently charged with assault before the District Court for the Eastern District of New York. The first statute under which the prosecution sought to invoke the jurisdiction of the District Court provided that " the trial of all offenses committed upon the high seas . . . shall be in the district where the offender is found, or into which he is first brought " (Title 28 U.S.C.A., s. 102). The other statute on which the prosecution sought to found the jurisdiction of the Court provided for the trial of an accused for offences committed " within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging . . . to any corporation created by or under the laws of the United States. . . ." (Title 18 U.S.C.A., s. 451.)

Case No. 47 *Contd.*

The accused challenged the jurisdiction of the Court and contended that, in so far as concerned the first statute here referred to, the offences were not committed " upon the high seas " and, in so far as concerned the second statute here referred to, offences committed on board an aircraft could not be said to have been committed on board a " vessel ".

Held : (i) that offences committed " over " the high seas were not offences committed " upon " the high seas, as provided in the first statute ;

(ii) that offences committed on board an aircraft were not offences committed on board a " vessel ", as provided in the second statute ;

(iii) that, consequently, the District Court had no jurisdiction to try the offences charged. The Court said :

" Were those acts committed on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State ? Or were those acts committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof or any corporation created by or under the laws of the United States, or of any State, Territory or District thereof ?

" The second question gives less difficulty than the other, and perhaps should be dealt with first. The answer that ought to be made turns on the question whether an airplane is a vessel, within the meaning of the Statute, and obviously the answer should be in the negative.

" In the famous Reinhardt case, *Reinhardt* v. *Newport Flying Service Corp.*, 1921, 232 N.Y. 115, 133 N.E. 371, 18 A.L.R. 1324, Judge Cardozo, speaking for the unanimous Court of Appeals, held that a hydroplane, which had been moored in navigable waters and had begun to drag her anchor, was within the admiralty jurisdiction. This holding was necessary for the decision of the case, because the problem before the Court was whether the New York State Workmen's Commission had jurisdiction to make an award to an employee engaged in attempting to save the plane when she was in danger of being wrecked. The lower courts had upheld the Commission's jurisdiction, but the Court of Appeals reversed. Once the conclusion was reached that while afloat in navigable waters a hydroplane is a ' vessel ' within the admiralty jurisdiction, it became clear that the jurisdiction of the Compensation Commission was excluded. *Knickerbocker Ice Co.* v. *Stewart,* 1919, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145.

" Judge Cardozo was careful to point out in dictum that even a hydroplane, while in the air, is not subject to the admiralty, citing *Crawford Bros*, No. 2 D.C. Wash. 1914, 215 F. 269, 271, a case which held that the admiralty had no jurisdiction to enforce a lien for repairs against an airplane on the theory that it is a vessel. The rationale of the *Crawford* case was that planes ' are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime '. A similar conclusion was reached, after the *Reinhardt* decision, in *United States* v. *Northwest Air Service, Inc.*, 9 Cir., 1935, 80 F. 2d 804. There an unsuccessful attempt was made to assert a maritime lien against an airplane libeled by the United States because of violations of the Air Commerce Act of 1926, 49 U.S.C.A. ss. 177 (*b*), 181 (*b*), the Tariff Act of 1930, 19 U.S.C.A. ss. 1454, 1459, and the Customs Regulations of 1931. The basis for the rejected maritime lien was the performance of work on the plane's engine while she was in a hangar on the shore of Lake Washington.

" Objection may be made that the cases so far mentioned are civil cases, and for that reason have no important bearing on questions of federal criminal jurisdiction. However, in *McBoyle* v. *U.S.* 1931, 283 U.S. 25, 51 S.Ct. 340, 341, 75 L.Ed. 816, Mr. Justice Holmes, construing the National Motor Vehicle Theft Act, held that it did not apply to a case where an airplane was stolen. The language of the criminal statute, 18 U.S.C.A. s. 408 (now s. 2311), was very broad : ' The term " motor vehicle " when used in this section shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails '. Of course, literally an airplane is a self-propelled vehicle not designed for running on rails. But Mr. Justice Holmes reasons that Congress was using the words ' vehicle ' in the popular sense, and that even though airplanes were well-known in 1919 when the statute was passed, Congress had laid down a rule of conduct ' in words that evoke in the common mind only the picture of vehicles moving on land '. By parity of reasoning, when, 18 U.S.C.A. s. 451, Congress speaks of a ' vessel ' within the admiralty and maritime jurisdiction of the United States, it evokes in the common mind a picture of a ship, not of a plane.

" Similarly, in another criminal case, a statute, 18 U.S.C.A. s. 469, making it a misdemeanor for any person to stow away on a vessel, was held inapplicable to a case where the defendant had stowed away on an airplane. *U.S.* v. *Peoples*, D.C. Cal. 1943, 50 F. Supp. 462. The *Reinhardt* and *McBoyle* cases are discussed in the opinion, as well as *Noakes* v. *Imperial Airways*, D.C. S.D.N.Y. 1939, 29 F. Supp. 412, where an airplane was denied the right to limit liability in the admiralty, a right which Congress has accorded to ' vessels '. After the decision in the *Peoples* case, Congress adopted the suggestion of the Judge who wrote the opinion and modified the law specifically to include aircraft within its coverage, 18 U.S.C.A. s. 2199, see 58 Stat. 111, Mar. 4, 1944.

Case No. 47 ***Contd.***

" Finally, and on the negative side, the *Reinhardt* case, even to the extent that it holds a drifting plane to be a vessel, has been legislated out of existence. The Air Commerce Act of 1926, 49 U.S.C.A. s. 171 *et seq.*, now contains a section, 49 U.S.C.A. s. 177 (*a*), providing that : ' The navigation and shipping laws of the United States, including any definition of " vessel " or " vehicle " found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft '.

" It seems, therefore, clear on precedent and on principle that even after airplanes became well-known, both Congress and the courts, saving the *Reinhardt* case, refused, and still refuse, to consider them as vessels even when they were afloat. In the instant case the plane was in flight, and it seems beyond argument that Cordova's acts cannot be prosecuted under a statute dealing with crimes committed on a ' vessel '.

" It now becomes necessary to return to the first branch of the statute, which denounces certain crimes committed on the high seas or other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, 18 U.S.C.A. s. 451. Beyond any doubt, Cordova's misconduct took place over the high seas. Is it proper, then, in a criminal case, to extend federal criminal jurisdiction to a plane in flight *over* the high seas under a statute which speaks of crimes committed *upon* the high seas or *on* any other waters within the admiralty and maritime jurisdiction of the United States ? It is, of course, ridiculous to suppose, as Mr. Justice Holmes says in the *McBoyle* case, that any criminal considers the text of the law before he murders or steals. At the same time it is important that a rule of conduct must be considered in the light of the ' picture ' it evokes in the common mind.

" It is perhaps irrelevant, but I have little doubt that had it wished to do so Congress could, under its police power, have extended federal criminal jurisdiction to acts committed on board an airplane owned by an American national, even though such acts had no effect upon national security. In *U.S.* v. *Flores*, 1933, 289 U.S. 137, 53 S.Ct. 580, 77 L.Ed. 1086, the Supreme Court of the United States went the extreme length of holding that the criminal jurisdiction of the United States, under this very statute, 18 U.S.C.A. s. 451, was broad enough to include acts committed on an American flag vessel, even though she was within the territorial waters of another sovereign. The Court has even suggested that a State of the Union may make a regulation valid and effective to rule conduct on the high seas, so long as the federal government has not occupied the field. *Skiriotes* v. *Florida*, 1941, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193. And on occasion the Supreme

Court has not been over technical to ascertain whether the crime was committed on the ship itself or in adjacent waters. *United States* v. *Holmes*, 1820, 5 Wheat. 412, 5 L.Ed. 122. For such a case the expression ' high seas ' was held to have a general meaning, and a similar result was reached when the Court was dealing with the question whether the term ' high seas ' was applicable to the Great Lakes. *United States* v. *Rodgers*, 1893, 150 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071.

" But none of these cases, nor the principles on which they rest, would justify the extension of the words ' high seas ' to the air space over them. It is at this point that the case at bar, I think, becomes one of first impression. The proper approach is, nevertheless, to be gathered, for example, from *United States* v. *Wiltberger*, 1820, 5 Wheat. 76, 5 L.Ed. 37. In that case the master of an American ship lying in the river Tigris off Wampoa in China was charged with manslaughter committed on board the vessel. The prosecution was laid under the Act of April 30, 1790, 1 Stat. 112. One section of that statute dealt with murder committed on the high seas, or any river, haven, basin or bay out of the jurisdiction of any particular state. Another section of the *same statute* dealt with manslaughter committed upon the high seas, but the other places were not mentioned. The Court was asked by the government to transfer the broader jurisdictional scope over murder to the crime of manslaughter, and to make the offense punishable when committed on a river, which did not come within the place-coverage of the words ' high seas '. Chief Justice Marshall refused to make any such judicial extension of the legislative definition, even though he agreed with the government that it was extremely improbable that Congress actually intended to make a fine jurisdictional definition [*sic*] as between murder and manslaughter. In other words, Congress, having limited jurisdiction over manslaughter to the ' high seas ', the Supreme Court held that the denounced acts, committed elsewhere, could not be punished on any theory of a probable Congressional intent to include those places.

" The acts for which Cordova stands charged were vicious in the extreme. He jeopardized the lives of others on the plane, including a considerable number of infants. But it seems to me clear that those acts have not been denounced by a statute which forbids them when committed on board an American ' vessel ', or when committed on the ' high seas '.

" The situation may call for correction. There has been for some years discussion by experts in the field of aeronautic law of how the problem can be solved. For example, the so-called de Visscher Draft Convention of 1937 suggests that crimes of this character ought to be punishable under the laws of the state of which the victim is a national, or of which the accused is a national, or of the state where the airplane arrives,

Case No. 47 Contd. if, in the latter case, what was done affects its security interests. The British Air Navigation Act of 1920 provides that any offense committed on a British aircraft shall be deemed committed in any place where the offender may for the time be. It is my understanding that French criminal law applies to French aircraft in flight any place in the world. Air Nav. Law 1924, Title V, Art. 20. Italian law, I have been told, also applies to Italian planes in flight anywhere, although this may be merely a civil code.

" What I gather is that there is little likelihood, if any, of an international agreement involving, as it necessarily would, difficult and delicate questions of sovereignty. However that may be, as the law now stands, acts like those committed by Cordova will go unpunished, unless the law of the domicile of the corporation can be considered to cover them.

" I, therefore, find Cordova guilty of the acts charged. But I must arrest judgment of conviction since there is no federal jurisdiction to punish those acts."

[Report : 89 F. Supp. 298.]

Case No. 48

High Seas—Jurisdiction over Ships on the High Seas—Issue of Warrant of Arrest in Respect of a Ship Not Yet Within the Jurisdiction—Procedure in South African Courts.

EX PARTE GOVERNMENT OF THE UNITED STATES OF AMERICA : *In re* S.S. *UNION CARRIER.*

South Africa, Cape Provincial Division of the Supreme Court.

(Searle J.)

February 3, 1950.

THE FACTS.—In May 1948 the American Government sold the s.s. *Union Carrier* to the Republic of China. A mortgage bond was accepted as part payment of the purchase price. At some later date the vessel appears to have fallen into the hands of the Government of the People's Republic of China—a Government not recognized by the Union of South Africa or the United States (who continued to recognize the so-called Nationalist Government of China established on Formosa). As a result of this seizure interest on the mortgage bond was not paid and capital instalments ceased. At the time of the application, in February 1950, for the issue and service of a writ of arrest, in an Admiralty action *in rem* pending before the Cape Court, it was alleged that a sum of $496,906 was due. Notice of the intention to foreclose on the mortgage had been served on the Chinese Ambassador in Washington, in January 1950.

On the day the application for a warrant of arrest was heard, the s.s. *Union Carrier* was on the high seas. She was expected, however, to call at either Cape Town or Port Elizabeth in a few days in order to obtain bunker fuel. The petition alleged that if any such call were made it might well be over the week-end, and that the ship would spend no more than a few hours in harbour. On the previous day, February 2, the applicant had obtained a writ of summons from the Court, in its capacity as an Admiralty Court, under the provisions of section 2 of the Colonial Courts of Admiralty Act 1890 (53 & 54 Vict. chap. 27), in an action *in rem* against the s.s. *Union Carrier*, claiming the amount due under the bond. It was argued that for the action to proceed it was essential to obtain a warrant of arrest immediately so that it could be served while the ship was in South African territorial waters.

The Consul-General in South Africa of the Chinese Nationalist Government had been notified of the pending action, and had telegraphed the Court that his Government waived any objection to the proceedings, and would not claim immunity.

Held : that the writ of summons had been validly issued prior to the *res* coming into the jurisdiction. The Court had the power to order a warrant of arrest before the ship entered South African territorial waters. The Court said :

" The two main difficulties appear to be, firstly, that the applicant and the respondent are *peregrini* and, secondly, that the vessel is not yet within the territorial jurisdiction of this Court. With regard to the first difficulty, it is quite clear that under Roman-Dutch law and South African practice the Court cannot at the instance of *peregrini* order an attachment *ad fundandam jurisdictionem* (*i.e.* so as to acquire a jurisdiction which it did not have otherwise) ; and as to the secondary difficulty the Court would not in any event have jurisdiction to order an attachment until the ship came within territorial waters (*vide Ex parte Rance* (1921, E.D.L. 3)). The present case is, however, an application under the Admiralty procedure in an action *in rem* on an unregistered mortgage bond and the Roman-Dutch law and South African practice have no application, *vide* s.s. *Humber* v. s.s. *Answald* (1912 A.D., 546 at p. 557) . . . etc. I must therefore as to this question of jurisdiction look to the procedure and practice under the British Courts of Admiralty which this Court follows in terms of sec. 2 (2) and 2 (4) of the Colonial Courts of Admiralty Act 1890 (53 & 54 Vict. chap. 27), in the absence of any statutory modification.

" No direct authority has been produced with regard to the question of arrest, but the case of s.s. *Españoleto* ([1920] P. 223) has been brought to my attention, in which it was held that in an Admiralty Court action *in rem* it is not necessary that at the time of issue of the writ of summons the ship should be within the territorial jurisdiction of the Court, even

Case No. 48 ***Contd.***

though the action commences on the date of the issue of such writ. . . .

" The Admiralty action *in rem*, the foundation of which is a ' maritime lien ' or claim upon the *res—vide The City of Mecca* (6 P.D. 106 at p. 113)—commences with the issue of the writ of summons, *vide* the s.s. *Españoleto* (*supra*), and is thus not dependent upon an arrest *ad fundandam jurisdictionem* in the sense in which that term is used in our law. As Jessel M.R. stated in reference to this action (*The City of Mecca* (*supra*, at p. 112)) : ' An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship '. Presence of the *res* within the territorial water may be essential at the time of trial—*vide* Rule 61 (*b*), Dicey, 5th Ed., p. 206 *et seq.*—although not necessary at the time of issue of the writ. Although it is only when both the writ of summons and the warrant of arrest have been properly served in terms of the Admiralty procedure that this action *in rem* can be heard by this Court, I cannot see any logical reason why a warrant of arrest in terms of the Admiralty procedure, which warrant stands valid apparently for one year, should only be issued after the ship has arrived. It is true it cannot be issued unless there exists a valid writ, and in the case of an action against a foreign ship, until the representative of that State has been given notice, but these preliminaries have been complied with. It can only be served when the ship comes into the Court's jurisdiction, and in the absence of any sound reason or authority to the contrary, I am prepared to hold that the issue of the warrant of arrest is on the same footing as the issue of the writ of summons, and, therefore, this Court can grant the order sought before the vessel arrives within its jurisdiction. The applicant has given very good reasons why in this case the Court should do so, and there is every reason to believe that the ship will arrive during the week-end. In the circumstances, I am prepared to grant the order."

[Report : (1950), 1 S.A.L.R. p. 880.]

D—THE AIR SPACE

Jurisdiction—Over and Within the Air Space—Offences Committed on Board of Aircraft Over the High Seas.

See Case No. 47 (*United States* v. *Cordova et Al.*).

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

Individuals — Position in International Law — Agreement between Seceding New State and Old State—Obligation to Protect Nationals of Former who had been in Military Service of Latter—Injunction against Disregard by the State of Obligations Undertaken in International Agreement. **Case No. 49**

APONNO *ET AL.* *v.* THE STATE OF THE NETHERLANDS (AMBOINESE SOLDIERS' CASE).

Holland, District Court of The Hague.
December 16 *and* 21, 1950.

Court of Appeal of The Hague. January 22, 1951.

Supreme Court. March 2, 1951.

THE FACTS.—For generations the Amboinese (inhabitants of the Island of Amboina, in the centre of the archipelago of the Southern Moluccas) had provided large numbers of soldiers for the military service of the Netherlands. It was particularly on behalf of the population of these islands that, in the instruments of the Round Table Conference of September–December 1949 between the Netherlands and the two chief political groups in Indonesia—the Republicans and the Federalists—the right of self-determination was guaranteed to those groups of the Indonesian population who did not wish to come under the Republic of the United States of Indonesia. Immediately after the formal transfer of sovereignty on December 27, 1949, however, the Republicans destroyed the federal structure of the new Indonesian State (Republik Indonesia Serikat) and by a *coup d'état* turned it into a unitarian State (Republik Indonesia). The population of the Southern Moluccas thereupon proclaimed themselves independent, under the name of the Republic of the South Moluccas (Republik Maluku Selatan), the Amboinese remaining loyal to the Queen of the Netherlands.

The Amboinese soldiers in the Royal Netherlands Army (K.N.I.L.) were in a difficult position. It had been agreed at the Round Table Conference that after the transfer of sovereignty the K.N.I.L. would be disbanded and the Amboinese soldiers discharged and sent elsewhere. According to an express provision (Article 11) of a General Order made in 1935, these

Case No. 49 *Contd.* soldiers had the right, on discharge, to claim to be sent to a place of their choice in the then Netherlands Indies (later re-named Indonesia), even outside their country of origin, and to be allowed to settle there. This arrangement, which was of a contractual nature, was confirmed in one of the additional agreements concluded between the Netherlands Government and the Indonesian parties to the Round Table Conference, viz., Article 44 of the Regulations on the Land Forces in Indonesia.[1] It was confirmed again in an arrangement concluded between the Netherlands and Indonesian Governments of July 14, 1950, Article 5 of which read : " Former K.N.I.L. soldiers of Indonesian descent shall be sent to the place of their choice, whether or not their place of origin ". This was expressed to be " in order to enable the Netherlands Government to fulfil their obligations towards the former K.N.I.L. soldiers who are to be discharged ". However, subsequently the Netherlands Government announced to the 13,000 Amboinese soldiers who were encamped on the Island of Java provisionally under Netherlands military command, their intention to transport them with their families to the Island of Amboina in mid-December 1950. At that time the main island of the Southern Moluccas was in danger of being overrun by troops of the Indonesian Republican Army (A.P.R.I.). In order to prevent their being forcibly transported to what would be an enemy-occupied country, on December 4/12, 1950, a group of Amboinese, then in Holland, instituted, on their own behalf and on behalf of certain soldiers in camp on Java, legal proceedings against the Netherlands State, as defendant, applying for (i) an injunction restraining the Government from carrying out their plan, (ii) a declaration granting the Amboinese soldiers freedom of choice of a future residence either on one of the other Southern Moluccan islands not yet occupied by the A.P.R.I., or on Western New Guinea, which was left under Netherlands rule, and (iii) an order for a " dwangsom " (penalty) of one million guilders to be paid by the State for every ship in which the Government might attempt to evacuate Amboinese soldiers or members of their families to territory under Indonesian control.

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[1] The " Regulations on the Land Forces in Indonesia under Netherlands Command after the Transfer of Sovereignty " formed Part II of the " Regulations on Military Affairs " attached to Article 7 of the " Agreement on Transitional Measures ". This Agreement, the " Charter of Transfer of Sovereignty ", and the Union Statute, were the main instruments drawn up by the Netherlands-Indonesian Round Table Conference and listed in the " Covering Resolution ". All were agreed upon at the second plenary meeting of the Conference of November 2, 1949, and became operative on December 27, 1949, the date of the formal transfer of sovereignty. The Dutch, Indonesian and English texts (the last to prevail in case of divergent interpretations of the other two) are to be found in *Staatsblad van het Koninkrijk der Nederlanden*, No. J 570 of 1949. The " Covering Resolution " mentioned three parties to the agreements, and was accordingly signed by three Delegations—those of the Kingdom of the Netherlands, the Government of the Indonesian Republic (the future Jogja Member State), and the Federal Consultative Assembly (representing the rest of Indonesia). Article 44 of the " Regulations on the Land Forces in Indonesia under Netherlands Command " reads as follows :

> " The special provisions effective on the day preceding the transfer of sovereignty which apply to personnel leaving the military service, shall be carried out."

Held (by the District Court): that the injunction should be granted and the declaration made as prayed. The Court observed that nothing in the Netherlands-Indonesian Agreement could be construed as meaning that freedom of choice of future residence granted to the Amboinese soldiers was limited to the territory of the new Republic of Indonesia; it applied to the whole of the former Netherlands Indies, including Western New Guinea which was a State under Netherlands rule. At the time of the transfer of sovereignty it had been taken for granted by the Netherlands, and assurance had been given by the Indonesians, that the native country of the soldiers would acquire the status of an autonomous component State of the Indonesian Federation.[1] In consequence, nothing else could then have been expected than their unanimous desire to return and settle there. It was well known that they wished for the autonomy of their native country and that it was only on this condition that they were prepared to form part of the Indonesian Republic. Since then, however, the situation which had arisen was one which no Amboinese was prepared in any circumstances to accept. It was one which the defendant State could not have foreseen, otherwise the Netherlands Government would and ought to have insisted on a provision regarding the discharge of the Amboinese in the event of violation by the new Indonesian State (R.I.S.) of its undertakings. The plaintiffs now regarded their native land as a country occupied by a hostile foreign Power. If the Government were permitted to carry their plan into execution they would be putting the lives and the freedom of their loyal servants in jeopardy. It was not within the competence of the Court to enter into a closer examination of the practical and political difficulties of the possible solutions of the problem. Only the complete impossibility of taking the Amboinese elsewhere than to Republican territory could absolve the defendant State from its commitments. Since Western New Guinea was available for evacuation, such impossibility clearly did not exist. [Report: *N.J.*, 1951, No. 70.]

The State appealed against this decision.

Held (by the Court of Appeal): that the appeal must fail. The question of where soldiers shall be demobilised after their discharge is generally a question of Government policy, falling outside the jurisdiction of the courts. This was not so, however, in a case such as this, where (foreign) soldiers had a formal

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[1] See, for the text of Article 2 of the Agreement on Transitional Measures, the quotation at pp. 149–150 above.

Case No. 49 *Contd.*

right of choice of their future residence. The Netherlands-Indonesian Arrangement of July 14, 1950, read with the preceding Convention of December 27, 1949, was clearly intended, *inter alia*, to protect them against removal to a place to which they did not wish to go. A Government might be prevented by what it considered to be imperative reasons of a military, political or other nature, from fulfilling the special wishes expressed by the soldiers concerned. What the Government could not in any circumstances do, however, was to send the ex-soldiers and their families to areas where their lives and freedom would be needlessly imperilled. It was moreover contrary to general principles of law that a State, without being under any obligation to that effect according to the law of nations, should deliberately proceed to hand over, defenceless, without any guarantee, and against their expressed wish, soldiers who belonged to its own army, together with their wives and children, to a State hostile to them and from whom they had valid reasons to fear reprisals threatening their freedom or their lives. It was not true that no such danger existed in the territory of the Southern Moluccas occupied by the Republican forces, since it was notorious that for a considerable time armed clashes had been taking place between A.P.R.I. forces and the inhabitants of the islands who regarded the former as invaders. [Not reported.]

The State appealed further.

Held (by the Supreme Court): that the further appeal must fail. On the one hand, evacuation of the Amboinese from the camps on Java to the Netherlands had proved feasible ; no objections could therefore be raised by the State on grounds derived from international or Union law. On the other hand, the Court below had found as a fact that transporting the soldiers to an island under Republican rule would place their lives in jeopardy. An injunction to prevent this must therefore issue.

[Report : *N.J.*, 1951, No. 217, with elaborate " conclusions " of the Procurator General and a Note by Professor Houwing.]

NOTE.—This case raises only indirectly a question of international law and is reported mainly for its international interest. The outcome of the case was the mass transportation of the Amboinese soldiers concerned from their camps on Java to Holland in accordance with the injunction of the Courts. The Amboinese soldiers and their families were aliens, having become Indonesian nationals as a result of the transfer of sovereignty, and, moreover, claimed a new nationality of their own following the proclamation of independence of their Republic of the South Moluccas on April 25, 1950. The Court by its injunction thus protected the rights of aliens—rights founded partly on municipal law and partly on international law—against the State of the Netherlands, which had twice made provision, in favour of the individuals concerned, in an international agreement.

Individuals—Position of—The Right to Travel—Right to a Passport.

See Case No. 7 (*Sachs* v. *Donges, N.O.*).

The Individual in International Law—Universal Declaration of Human Rights—Applicability to Time of War.

See Case No. 122 (*Auditeur Militaire* v. *Krumkamp*).

The Individual in International Law—Crimes against Humanity—Prosecution of—Limits of.

See Case No. 123 (*In re Pilz*).

B—NATIONALITY

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Nationality—Effect of Change of Sovereignty—Austrian Nationality—The Law of Austria. **Case No. 50**

In *Re Tancredi*, decided on June 3, 1949, by the Court of Appeal of Naples, it was *held* that a woman of Italian nationality married to a former Austrian who had lost Austrian and acquired German nationality in virtue of the annexation of Austria by Germany in 1938 and who had lost German nationality on November 25, 1941, in consequence of the German anti-Jewish legislation, but who had automatically recovered Austrian nationality in consequence of the Austrian law of July 10, 1945, had become an Austrian national and was not stateless so as to retain her former Italian nationality in accordance with article 10 (3) of the Italian Nationality Law of June 13, 1912, No. 555.[1]

[Report: *Giurisprudenza Italiana*, 102 (1950) I, 2, 16, with a note by Cansacchi.]

NOTE.—See also *Poliakine* v. *Commune of Viterbo*, decided on January 24, 1950, by the Court of First Instance of Viterbo. [Report: *Giurisprudenza Italiana*, 103 (1951), I, 2, 44.]

Nationality—Effect of Change of Sovereignty.

See Case No. 27 (*Goods of Shiphris*).

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[1] Printed in Flournoy and Hudson, *Nationality Laws* (1929), p. 363.

V.—Naturalization

Case No. 51 **Naturalization—Service on Board Vessel as Substitute for Requirement of Continuous Residence—Home Port of Vessel in Country of Naturalization—Meaning of "Home Port"—The Law of the United States of America.**

APPLICATION OF AGUIRRE AND OTHERS.

United States, District Court for the Southern District of New York. May 24, 1950.

THE FACTS.—Section 325 (*a*) of the United States Nationality Act, 1940 (8 U.S.C.A., s. 725 (*a*)), provides for the naturalization of persons who have served with good conduct for an aggregate period of at least five years "on board vessels . . . whether or not documented under the laws of the United States . . . which are not foreign vessels, and whose home port is in the United States".[1] The applicants were seamen who had served for more than five years on vessels which were owned by companies incorporated in Panama and Honduras, respectively, and registered under the flags of those countries, but which were under charter to the United Fruit Company, a corporation registered in the United States. It was found as a fact that the crews serving on the vessels were customarily signed on, discharged and paid off in United States ports where the vessels called on their regular journeys. The applicants, in support of their applications for naturalization in the United States, relied on the contention that, having regard to the facts here set out, the "home port" of the vessels must be regarded as being situate in the United States and that they were therefore entitled to naturalization in accordance with the provisions of section 325 (*a*) of the Nationality Act, 1940. The respondents, the Immigration and Naturalization Service, on the other hand, contended that the "home port" of a vessel was the port in which the vessel was registered and that, as the vessels were registered in Panama and Honduras, respectively, their home port was not situate in the United States, and that the applicants were therefore not entitled to naturalization.

Held : that the material factor to be considered in cases of this kind was whether an alien's service was such as to "expose him to a scrutiny which is the measurable equivalent of actual residence" (*United States* v. *Camean*, 174 F. 2d 151), and that, having regard to the facts in the present case, the applicants' service satisfied this requirement, with the result that the "home port" of the vessel could be regarded as being situate in the United States and that the applicants were accordingly entitled to naturalization.

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[1] The corresponding provision is now contained in section 330 (*a*) (1) of the Immigration and Nationality Act, 1952.

[Report : 90 F. Supp. 668.]

NOTE.—It is thought unnecessary to give a full report of this case as it bears on the interpretation of a national statute. However, the peculiarity of the issue seems to justify a brief digest of it.

VI.—Expatriation. Loss of Nationality. Denationalization

Nationality—Loss of—By Expatriation—Voting by Citizen of Occupying Country in Parliamentary Election in Occupied Country—Vote Cast under Coercion—Whether Fact of Voting Justifies Expatriation—The Law of the United States of America. **Case No. 52**

HATSUYE OUYE *v.* ACHESON, SECRETARY OF STATE.

United States, District Court for the District of Hawaii. May 12, 1950.

THE FACTS.—The plaintiff, who was of Japanese parentage, was born in the Territory of Hawaii, a possession of the United States, and was, by virtue of her birth in United States territory, a citizen of the United States. In 1946, while Japan was under American occupation, the American Supreme Commander ordered parliamentary elections to be held in that country. The plaintiff, who was then in Japan, was induced and/or coerced by the American military authorities to vote in these elections. Thereupon the United States Vice-Consul, acting on behalf of the defendant, the Secretary of State, deprived her of her United States nationality on the ground that by voting in the Japanese elections she had expatriated herself as provided in section 401 (*e*) of the Nationality Act, 1940 (8 U.S.C.A. s. 801 (*e*)). The plaintiff contended that she had voted under coercion and not as a result of her own free and independent choice, and that as United States citizenship can only be waived by the exercise of free and independent choice she had not expatriated herself, and that she was therefore entitled to be restored to her rights as a United States citizen.

Held : that the plaintiff's contention was correct, that her purported expatriation must be cancelled, and that she must be restored to her rights as a United States citizen. The Court said :

" The plaintiff voted as the result of being induced so to do by the United States, through General Douglas MacArthur, its agent ; additionally, as the result of pressure from public opinion from the community in which she resided, and additionally, as the result of coercion due to fear of loss of food

Case No. 52 *Contd.*

rations as well as fear of punishment. The plaintiff's voting was not the result of free and independent choice, nor the result of her free and voluntary act.

" The benefits of citizenship can be renounced, lost or waived only as the result of free and intelligent choice. Since the purported expatriation of plaintiff Hatsuye Ouye was not as a result of her free and intelligent choice, but rather because of mental fear, intimidation and coercion, and inducement by the United States, through General Douglas MacArthur, depriving her of the free exercise of her will, said purported expatriation is void and of no force and effect.

" The plaintiff is entitled to have her purported expatriation cancelled and further entitled to be restored to her full rights of citizenship including the issuance of a passport ; and to be adjudged a citizen of the United States.

" Judgment is hereby ordered to be entered cancelling the purported expatriation of the plaintiff and adjudging that the plaintiff be restored to her full rights of citizenship and to be adjudged a citizen of the United States."

[Report : 91 F. Supp. 129.]

Case No. 53

Nationality—Loss of—By Expatriation—Voting by Citizen of Occupying Country in Election in Occupied Country—Meaning of " Political Election in Foreign State "—Vote Cast under Coercion—Whether Fact of Voting Justifies Expatriation—The Law of the United States of America.

YAMAMOTO *v.* ACHESON, SECRETARY OF STATE.

United States, District Court for the District of Arizona.
July 23, 1950.

THE FACTS.—The plaintiff, a native-born citizen of the United States of Japanese parentage, was an employee of the United States Army in Japan while that country was under United States occupation. In 1946 a general election of members of the Japanese House of Representatives was held by order of the Supreme Commander of the forces occupying Japan, and in that election the plaintiff voted, having been induced to do so by personnel of the United States army who had persuaded her that it was in the interest of the United States that she should cast a vote in the election. Thereupon the United States Consul at Yokohama, acting on behalf of the defendant, the Secretary of State, issued to the plaintiff a certificate of loss of her United States nationality on the ground that by voting in the election she had voluntarily expatriated herself by " voting in a political election in a foreign state ", contrary to section 401 (*e*) of the United States Nationality

Act, 1940 (8 U.S.C.A., section 801 (*e*)). On behalf of the plaintiff it was contended that, Japan being under United States occupation, the election held in that country was not " a political election in a foreign State " within the meaning of the Nationality Act, and that, in any event, she had not voted as a result of her own free choice, having been induced to do so by fear and intimidation.

Held : that an election held in occupied Japan was not a " political election in a foreign state " within the meaning of the Nationality Act, that the plaintiff had not voted in that election as a result of her own free choice, and that, accordingly, her purported expatriation must be cancelled, and she must be adjudged a United States citizen. The Court said :

". . . The plaintiff in voting in the election of April, 1946, in Japan was led to believe and understood that this was an election serving the interests of the United States. She did not thereby express any preference for the Japanese government over that of the United States, but rather showed herself to be a loyal American citizen in participating in this election. In so voting, the plaintiff acted in good faith without any intention, or desire to adopt or show any allegiance to Japan ; in so voting the plaintiff in good faith believed she was showing, and intended to show, allegiance to the United States. . . .

" In 1946 Japan was under the occupation of military forces, consisting largely of troops of the United States, under command of General Douglas MacArthur, General of the United States Army, with the title Supreme Commander of the Allied Powers. Subsequent to the unconditional surrender of Japan in 1945, and up to and including 1946, General Douglas MacArthur, as Supreme Commander, aforesaid, had complete power, authority and control over the Japanese government and the Japanese people. His complete power and authority included the power to make such orders as he desired and was accompanied by the authority and power to enforce such orders by any means at his command, including the use of force. During said time the Japanese government has at all times been subject to such orders ; and Japan has not been an independent or sovereign state.

" General Douglas MacArthur was designated and appointed as Supreme Commander by the United States. His mission and duties in Japan are to carry out, effectuate and enforce United States objectives in Japan. As Supreme Commander he has been instructed by the United States to ' exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States objectives ' ; and to encourage the Japanese people to become familiar with the history, institutions, culture, and the accomplishments of the United States and other democracies.

Case No. 53 *Contd.*

" On October 4, 1945, the Japanese government was ordered by the Supreme Commander to establish a ' Bill of Rights '. On December 18, 1945, the Supreme Commander ordered the Japanese Diet dissolved. On January 4, 1946, certain directives were issued by the Supreme Commander of the Allied Powers which resulted in the ineligibility to hold office of nine out of every ten high officials of the Japanese government and 120 political organisations were put in the process of dissolution. On January 12, 1946, the Japanese government was ordered to hold a general election of members of the House of Representatives. One of the purposes of the election was, according to a statement by General MacArthur on election results issued April 25, 1946 (among other purposes), ' to provide the legislation required for the implementation of S.C.A.P. directives. . . .' Although occupation forces were to maintain an ' attitude of impartiality toward the election and care was taken to publicize the fact that candidates cleared by the Japanese government did not have S.C.A.P. sanction and support as some claimed ', it was publicized ' that the records of all candidates would be subject to S.C.A.P. review '. ' A supervised organization was set up to provide surveillance by troops in the field which would insure immediate disclosure of any irregularities.'

" This election ordered and controlled by United States military personnel to obtain a legislature which would carry out United States objectives, was not a political election in a foreign state."

[Report : 93 F. Supp. 346.[1]]

Case No. 54

Nationality—Loss of—By Expatriation—Voting by Citizen of Occupying Country in Election in Occupied Country—Meaning of " Political Election in Foreign State "—Whether Fact of Voting Justifies Expatriation—The Law of the United States of America.

BREHM *v.* ACHESON, SECRETARY OF STATE.

United States, District Court for the Southern District of Texas (Houston Division). April 25, 1950.

THE FACTS.—The plaintiff was a native-born citizen of the United States. In 1948, while in a part of Germany which was then under United States military occupation, she voted in a

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[1] See also the judgment of the District Court for the Western District of Washington, of August 24, 1950, in *Kuniyuki* v. *Acheson, Secretary of State*, 94 F. Supp. 358, which is to the same effect, and where reference is made, at page 365, to the above case. It may be observed that in the *Kuniyuki* case the plaintiff was a person of dual nationality, being a United States citizen as well as a Japanese national. See also *Haruko Furuno* v. *Acheson, Secretary of State*, 94 F. Supp. 381 ; and *Mitsue Masuko Kai* v. *Acheson, Secretary of State*, 94 F. Supp. 383 ; further, to the same effect : *Harumi Seki* v. *Acheson, Secretary of State*, *Yada* v. *Acheson, Secretary of State*, 94 F. Supp. 438 ; *Fumi Rokui* v. *Acheson, Secretary of State*, 94 F. Supp. 439.

German municipal election. Thereupon the defendant, the Secretary of State, issued a certificate adjudging the plaintiff to have lost and forfeited her American citizenship by reason of her having voted " in a political election in a foreign state . . .", contrary to section 401 (*e*) of the United States Nationality Act, 1940.[1] The plaintiff instituted proceedings to have the defendant's certificate set aside and further asked for a declaration that she was still a citizen of the United States. In support of her case she contended that the vote she had cast in the German municipal election was not a vote " in a political election in a foreign state ", on the ground that Germany was not a foreign state within the meaning of the Act. The defendant, on the other hand, contended that by casting a vote in the election the plaintiff had acted in contravention of section 401 (*e*) of the Act.

Held : that as the election in which the plaintiff had voted had been held in territory ruled and governed by the United States, it was not " a political election in a foreign state ", and that, accordingly, the plaintiff was entitled to have the defendant's certificate (adjudging her to have lost her citizenship) set aside and her American citizenship confirmed. The Court said :

". . . The evidence shows that plaintiff at the time of such election was in the employ of the Mayor (Bürgermeister) of the Town or City of Rodach, Germany, and voted in an election held in such City for a Mayor and three Members of the Community Council of such City. Her testimony before the Court was the same as in her affidavit of August 30, 1949, offered by defendant. There is some suggestion that plaintiff was under duress, but the facts do not support that view. She was probably influenced to vote by reason of the fact that she was in the employ of the Mayor, but she was not under duress when she voted.

" In a publication or book of 241 pages offered and admitted in evidence, styled ' Occupation of Germany—Policy and Progress ' issued by the Department of State of the United States for 1945 and 1946 (Publication 2783, European Series 23), there are set forth the relations of the United States and Germany at the time such election was held, and it is made clear that the area in which the election was held was not a foreign state or territory within the meaning of Section 801 (*e*).

" My conclusion is that the election of January 27, 1946, at which plaintiff voted, was held in territory then ruled and governed by the United States and was held by permission and under the direction and by the authority of the United States. And that when plaintiff voted, she was not voting in a

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[1] The section further provides that United States nationality may also be lost if a person " participates in an election or plebiscite to determine the sovereignty over foreign territory ".

Case No. 54 *Contd.* political election in a foreign state, nor was she participating in an election or plebiscite to determine the sovereignty over foreign territory within the meaning of Section 801. A helpful case is *Etsuko Arikawa* v. *Acheson*, D.C. 83 F. Supp. 473."

[Report : 90 F. Supp. 662.]

Case No. 55 **Nationality—Loss of—By Expatriation—Voting in Election in Foreign Country—Whether Fact of Casting Vote Results in Loss of Nationality—The Law of the United States of America.**

KAZDY-REICH *v.* MARSHALL, SECRETARY OF STATE.

United States, District Court of the District of Columbia.
January 9, 1950.

THE FACTS.—The plaintiff, a native-born citizen of the United States resident in Hungary, cast a vote in a political election in that country in November 1945. She subsequently brought an action against the Secretary of State of the United States for a declaration that, notwithstanding that she had taken part in a political election in a foreign country, she was a citizen of the United States. On behalf of the Secretary of State it was contended that by voluntarily voting in a foreign election the plaintiff had expatriated herself in accordance with section 401 (*e*) of the Nationality Act of 1940 which provides that a national of the United States, whether by birth or naturalization, shall lose his nationality by voting in a political election in a foreign State. On behalf of the plaintiff it was contended that she had taken part in the election only because she feared that if she had refused to do so she would have been liable to arrest, imprisonment and other punishment, and that accordingly her action was involuntary and did not result in expatriation.

Held : As on the facts there was no evidence of pressure having been exercised against the plaintiff, she must be held to have acted of her own free will and to have expatriated herself ; accordingly her action failed. The Court said :

" Plaintiff brought this action for a judgment declaring that she is a citizen of the United States. The action was defended on the ground that plaintiff expatriated herself under Section 401 (*e*) of the Nationality Act of 1940, 8 U.S.C.A. s. 801 (*e*), by voting in a national election in Hungary. Plaintiff was a native-born citizen of the United States. In 1925 she married a Hungarian, and they resided in the United States until 1935 except for a visit to Hungary of several months. In 1935 they again went to Hungary and were there when the war broke out. Hungary called plaintiff's husband for military duty and plaintiff remained in Hungary. In January 1945 Hungary signed an armistice with the United States, Russia and Great Britain. An Allied Control Commission was set up in Hungary, but the military personnel there of the United States and Great Britain numbered several hundred, while that of Russia totalled nearly a million. Thereafter in November 1945 the Provisional Government of Hungary held a national election, the voting being by secret ballot. The United States had an official observer of the conduct of this election, and deeming it a free election the United States established diplomatic relations with the Hungarian Government. The plaintiff voted in the election, but contends she acted under coercion and fear, and not in the exercise of her free will.

" Plaintiff claims that her husband was well known for his opposition to Communists and that following the armistice plaintiff and her husband were afraid of the Communists then occupying Hungary and that his life was in danger. She testified that in the summer of 1945 there was publicity urging the people to vote in the national election in November ; that there was posted in the lobby of the building where plaintiff and her husband resided two lists—one of eligible voters and one of non-voters ; that to plaintiff's surprise her name was on the list of eligible voters ; that the list of non-voters included criminals, Nazis and undesirables ; that it was dangerous to be on the non-voters' list as persons listed thereon were subject to arrest, imprisonment or deprivation of food ration tickets ; that on the day of the election plaintiff went to a school building to vote ; that the officers were lined up in a row and at a desk at the end of the row was a sister of a former Secretary of War who smiled reassuringly at plaintiff as plaintiff went into the booth ; that plaintiff received a ballot, marked it and cast it ; that people were alarmed over the way the Communists were behaving ; that Hungary realized that she was in the power of the Soviets so that all anti-Communists told one another to vote on ballot 7 ; that plaintiff wanted to weaken the power of the Communists ; that she knew of no law in Hungary making voting compulsory ; that she had not been threatened with bodily harm ; that she was healthy at the time except that she lived in constant fear of the Communists ; and that the Communists lost the election.

" Plaintiff claims she intended to remain a citizen of the United States, and that she would not have voted in the national election in Hungary had she known it would end her United States citizenship. The evidence shows that on occasions in 1944 and 1945 she represented herself as a United States citizen.

" The Court reaches the conclusion that the plaintiff voted voluntarily in the Hungarian national election. In the light of her testimony the fact that she went to the polls and voted

Case No. 55 *Contd.*

against the Communists indicates a free will rather than the contrary. Plaintiff's action in voting was not due to any coercion exercised by the Hungarian Government or by the Communists. Indeed there is no testimony that any attempt whatever was made to have the plaintiff vote except her statement that all anti-Communists told one another to vote and that there was publicity urging people to vote. Even if plaintiff intended, as she insists, to remain a citizen of the United States, nevertheless, by virtue of the Nationality Act her expatriation took effect when she voted in the Hungarian national election.

"The complaint will be dismissed."

[Report : 88 F. Supp. 787.]

Case No. 56

Loss of Nationality—Denaturalization of Naturalized Citizens—Conviction for Espionage—Conviction prior to Denaturalization—Liability to Deportation—The Law of the United States of America.

UNITED STATES *ex rel.* EICHENLAUB *v.* SHAUGHNESSY,
ACTING DISTRICT DIRECTOR OF IMMIGRATION AND
NATURALIZATION.

United States, Supreme Court.

(Vinson C.J.; Black, Reed, Frankfurter, Jackson, Burton, Minton JJ.)

January 16, 1950.

THE FACTS.—The Act of May 10, 1920, provides that all aliens who since August 1, 1914, "have been or may hereafter be convicted" of any violation of the Espionage Act of 1917, as amended, shall be deported if found to be undesirable residents of the United States. The relator was born in Germany in 1905 and became a naturalized American citizen in 1936. In 1941, while still an American citizen, he was convicted of an offence under the Espionage Act of 1917, and in 1944 his American citizenship was cancelled by the United States District Court for the Southern District of New York. In 1945 the Attorney-General ordered his deportation. In proceedings for a writ of habeas corpus the relator contended that he was not liable to deportation as the Act of May 10, 1920, permitted only the deportation of persons who had the status of aliens at the time of conviction, and not of those who at that time were naturalized American citizens, notwithstanding that they might subsequently have been denaturalized.

Held (*per Curiam*, Frankfurter, Black and Jackson JJ. dissenting) : (i) that the Act applied to all persons who were aliens at the time when their deportation was ordered, regardless of whether or not they had been naturalized American citizens when convicted of an offence under the Espionage Act of 1917, that the order for the relator's deportation must stand, and that the judgment of the Court of Appeals dismissing an application for a writ of habeas corpus must be affirmed ;

(ii) that, in order to arrive at this decision, it was not necessary—as had been suggested by counsel for the government—to have recourse to an artificial construction of the relator's denaturalization, which would have the effect of depriving him of his status as an American citizen as from the date of his naturalization. The Court said : [1]

" The one substantial issue is whether the Act requires that the relators not only must have been ' aliens ' at the times when they were ordered deported, but that they must also have had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were ' aliens ' when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators' naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg* v. *United States*, 60 F. 2d 475 (C.A. 3d Cir.). They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly, they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an alien status when convicted of the designated offenses.

" In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denaturalization orders. A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offenses are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.

" The statutory language which says that ' aliens who since August 1, 1914, *have been or may hereafter be convicted* . . .' (emphasis supplied) refers to the requirement that the deportations be applicable to all persons who had been convicted of

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[1] The Court dealt in the same judgment with the case of the relator *Eichenlaub* and that of the relator *Willumeit*, the facts in both cases being almost identical. Cf. 338 U.S. 524.

Case No. 56 Contd.

certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920. The crimes listed were not crimes in which convictions depended upon the citizenship, or lack of citizenship, of their perpetrators. In fact, they were crimes against the national security, so that their commission by naturalized citizens might well be regarded by Congress as more reprehensible than their commission by aliens who never had been naturalized.

" The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favour of any aliens because they were at one time naturalized citizens, the logical time at which that status would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute.

" The failure of Congress to give expression to the distinction, here urged by the relators, between aliens who never have been naturalized and those who have been denaturalized, was not due to unfamiliarity with such matters. In 1920, Congress must have been familiar with the status of aliens denaturalized under s. 15 of the Act of June 29, 1906, 34 Stat. 601, see 8 U.S.C. s. 736, or expatriated under s. 2 of the Citizenship Act of March 2, 1907, 34 Stat. 1228, see 8 U.S.C. s. 801. It had had experience with the deportation of undesirable aliens under s. 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, see 8 U.S.C. s. 155, as well as under other wartime Acts and Proclamations. These Acts did not distinguish between aliens who never had been naturalized, and those who had obtained naturalization by fraud only to lose it by court decree. If the Act of 1920 had been intended to initiate the distinction here urged by the relators, it is likely that the change would have been made by express provision for it. We find nothing in its legislative history that suggests a congressional intent to distinguish between two such groups of undesirable criminals.

" The Congressional Committee Reports demonstrate that, while this statute was framed in general language and has remained in effect for 30 years, its enactment originally was occasioned by a desire to deport some or all of about 500 aliens who were then interned as dangerous enemy aliens and who might be found, after hearings, to be undesirable residents, and also to deport some or all of about 150 other aliens who, during World War I, had been convicted of violations of the Espionage Act or other national security measures, and who might be found, after hearings, to be undesirable residents. It is hardly conceivable that, under those circumstances, Congress, without expressly saying so, intended to prevent the Secretary of Labor (or his successor, the Attorney General) from deporting alien offenders merely because they had received their respective convictions at times when they held certificates of naturalization, later canceled for fraud. To do so would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it. Congress, in 1920, evidently wanted to provide a means by which to free the United States of residents who (1) had been or thereafter were convicted of certain offenses against the security of the United States, (2) had been or thereafter were found, after hearings, to be undesirable residents of the United States, and (3) being aliens were subject to deportation. Congress said just that.

"We have given consideration to such other points as were raised by the relators, but we find that they do not affect the result.

"The judgment of the Court of Appeals in each case is therefore affirmed."

[Report: 338 U.S. 521.]

Nationality—Loss of—By Expatriation—Failure to Return to Country of Origin—Whether Involuntary Failure to Return Justifies Expatriation—The Law of the United States of America. **Case No. 57**

REPETTO *v.* ACHESON, SECRETARY OF STATE.

United States, District Court for the Northern District of California. November 15, 1950.

THE FACTS.—The United States Nationality Act of 1940 which came into operation on January 13, 1941, provided, *inter alia*, that a person failing to return from a foreign country to the United States on or before January 13, 1943, was liable to be expatriated. The plaintiff was a native-born citizen of the United States, and in 1920, when she was six years of age, she was taken to Italy by her parents. In 1937, in 1941 and in 1946 she attempted to return to the United States for permanent residence, but on each occasion when she made application for a United States passport to the competent United

Case No. 57 *Contd.* States representative in Italy her application was refused, and she was thus unable to return to the United States on or before January 13, 1943. In 1946 she was informed by the United States Department of State that owing to her failure to return to the United States she had been expatriated in pursuance of section 401 (*a*) of the Nationality Act, 1940 (8 U.S.C.A., s. 801 (*a*)). The plaintiff thereupon brought an action against the defendant, the Secretary of State, asking for her rights of United States citizenship to be restored, her contention being that she had been prevented from returning to the United States through no fault of her own and that she had always remained loyal to that country.

Held : that the plaintiff's failure to return to the United States on or before the date provided for in the Nationality Act, 1940, was involuntary and that she was accordingly entitled to have her rights of United States citizenship restored.

[Report : 94 F. Supp. 623.]

NOTE.—The judgment of the Court is not set out as it deals in substance only with the questions of fact to which reference is made above.

Case No. 58

Nationality—Loss of—Service in Armed Forces of Enemy Country—Service Induced by Coercion and Threats of Violence—Whether a Ground for Expatriation—The Law of the United States of America.

KANNO *v.* ACHESON, SECRETARY OF STATE.

United States, District Court for the Southern District of California (Central Division). June 23, 1950.

THE FACTS.—The plaintiff, who was of Japanese parentage, was born in the United States and was therefore a United States citizen by birth. At the age of two he was taken to Japan by his mother in order to receive his education in that country. After the outbreak of war between the United States and Japan the Japanese authorities, disregarding his protests, conscripted him for service with the Japanese armed forces. When the war had come to an end the United States Consul at Yokohama, Japan, acting on behalf of the defendant, the Secretary of State, issued a certificate to the effect that the plaintiff had lost his United States nationality, the defendant's contention being that by serving in the army of a country at war with the United States he had voluntarily expatriated himself. The plaintiff thereupon instituted proceedings for a declaration that he was still a citizen of the United States, contending that he had been compelled to join the Japanese army by fear of imprisonment and threats of physical punishment.

Held : that on the facts it was clear that the plaintiff had not joined the army of a country at war with the United States of his own free will, that he had not committed any act of disloyalty towards the United States, which would render him liable to lose his United States citizenship, and that he was accordingly entitled to a declaration that he was still a citizen of the United States. The Court said :

" The service of the plaintiff in the Japanese Army was not a free and voluntary act, but was the result of fear, coercion and intimidation. . . .

" Let judgment in favor of the plaintiff and against the defendant herein be entered accordingly."

[Report : 92 F. Supp. 183.[1]]

Nationality—Loss of—Revocation of Naturalization—Consent Judgment Revoking Naturalization—Fraud in Obtaining Naturalization—Fraud as to Conduct Subsequent to Naturalization—Validity of Consent Judgment—Whether Subsequent Conduct Constitutes Fraud—The Law of the United States of America.

Case No. 59

UNITED STATES *v.* EICHENLAUB.

United States, Court of Appeals of the Second Circuit.
February 3, 1950.

THE FACTS.—The appellant, who was of German origin, became a naturalized United States citizen in 1936. Thereafter complaint was made by the United States authorities that the appellant was consorting with German agents in order to advance German interests in the United States and that he had obtained his naturalization by fraud, the allegation being that he had embraced United States nationality with a " mental reservation " not to support the Constitution and laws of the United States. In 1943 the authorities instituted proceedings for the revocation of the appellant's naturalization on the grounds set out above, and the appellant having stated that he had no defence to the action, the court entered a consent judgment revoking his naturalization. In 1946 the appellant filed a motion to vacate the judgment, and his motion having been denied by the District Court for the Southern District of New York, he now appealed. On appeal he contended, firstly, that the court which revoked his naturalization ought to have required proof of the matters alleged against him, instead of entering a consent judgment based on his admissions, and secondly, that there could be no fraud in the procurement of

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[1] The judgment of the District Court for the Southern District of California, of November 14, 1950, in *Noburo Kato* v. *Acheson, Secretary of State*, 94 F. Supp. 415, is to the same effect ; see also *Ozasa* v. *Acheson, Secretary of State*, 94 F. Supp. 436.

Case No. 59 *Contd.*

naturalization where the alleged fraudulent acts related to conduct subsequent to the date of naturalization.

Held (Frank, Circuit Judge, dissenting): that a Court was entitled to enter a consent judgment revoking naturalization without requiring independent proof in addition to a person's formal consent, and that there was fraud in obtaining naturalization where the fraudulent acts related to conduct subsequent to the date of naturalization; that, accordingly, the order of the Court of first instance denying the motion to vacate the revocation of the appellant's naturalization must be affirmed. The Court said:

" No claim is made that the appellant's attorney was incompetent or in any respect derelict in his duty to his client or that he did not fully understand the nature and effect of the consent which the appellant signed. So far as this record shows, no claim as to any lack of understanding by appellant himself was made below, though his present attorney has suggested in the brief filed on this appeal, without any supporting proof in the record, that appellant's education is ' meager ' and his understanding of the English language ' limited '. Nor was, or is, there any claim that appellant's consent was induced by duress or fraud, though it is said, again without any supporting proof, that he was told by an Assistant United States Attorney that if he entered his consent, his privileges as a citizen would merely be suspended for the duration of the war.

" Whatever merit there is in this appeal is to be found in the contention that, as a matter of law, a consent to judgment in an action to revoke naturalization and cancel a certificate of naturalization is insufficient as a substitute for proof to support the judgment. The case of *Klapprott* v. *United States*, 335 U.S. 601, 69 S.Ct. 384, upon which appellant seems mainly to rely for this proposition, does not support it. That case dealt with a default judgment and, as the original judgment of the Supreme Court was subsequently modified, 336 U.S. 942, 69 S.Ct. 384, the cause was remanded to the district court for a determination as to whether there had been any denial of legal right in the way the default judgment had been entered. By necessary implication it would seem that there has been no authoritative holding that a *default* judgment is *per se* invalid in a denaturalization proceeding. The *Klapprott* case thus by no means requires us to reach the conclusion that a judgment entered upon a defendant's formal *consent*, given under the advice of counsel, is invalid *per se*. Indeed, we have already decided, without discussion, that it is not. *United States* v. *Beland*, 2 Cir., 164 F. 2d 95.

" It is true that clear and convincing evidence is necessary to support a contested complaint which seeks to cancel a certificate of naturalization. *Baumgartner* v. *United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Schneiderman* v. *United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796; *United States* v. *Sotzek*, 2 Cir., 144 F. 2d 576. But it would seem clear that, regardless of the standard of proof required, equivalent to proof is a consent to the entry of judgment given by a defendant with the knowledge and consent of an attorney representing him in what, for the purposes of this appeal, must be taken to have been a competent and loyal manner. Even assuming that proceedings for denaturalization under Section 338 of the Nationality Act are wholly to be governed by the same principles as criminal cases, the same result must follow, for a plea of guilty or a plea of *nolo contendere* to a criminal charge makes unnecessary the introduction of evidence by the prosecution, and a consent judgment in denaturalization proceedings must be considered the equivalent of such pleas, or one of them.

" Appellant contends, however, that the government was limited in its proof to the matters charged in the complaint and that since the allegations in the complaint ' in the main ' related to conduct subsequent to the filing of appellant's petition for naturalization and admission to citizenship, the complaint was insufficient to establish illegal and fraudulent procurement of naturalization under *Baumgartner* v. *United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525. This contention is primarily based on the fact that the complaint alleged that after appellant's naturalization he acted as a German agent in the United States and collaborated with German agents for the purpose of advancing German interests in the United States and that ' by reason of the foregoing ' naturalization was fraudulently and illegally procured by him in that when he filed his petition for naturalization and when he was admitted to citizenship he was not attached to the principles of the United States Constitution and did not intend to renounce fidelity to Germany or to support and defend the Constitution and laws of the United States.

" Regardless of any amendment which might have been made, had the point been raised, we think the complaint supports the judgment. While the majority of the Supreme Court in the *Baumgartner* case said that denaturalization on the ground of fraud ' calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected . . . to an earlier year ', 322 U.S. at page 675, 64 S.Ct. at page 1246, 88 L.Ed. 1525, it did not hold that evidence of subsequent acts would as a matter of law be insufficient proof of an earlier fraudulent intent. Rather, the majority simply held that, on the facts presented, evidence as to Baumgartner's attitude after 1932 afforded ' insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country'. 322 U.S. at page 677, 64 S.Ct. at page 1246. The appellant's contention seems to be based not on the opinion of the Court in that case but upon the reasoning in the concurring opinion, expressing the views of four of the Justices, which does indeed strongly imply that proof of subsequent statements or attitudes can never support denaturalization on the ground of fraud. See 322 U.S. 679–80, 64 S.Ct. at page 1247. It follows, we think, that the complaint here was not insufficient as a matter of law on the ground urged and this is enough to dispose of the point.

" By virtue of appellant's consent, the allegations of the complaint were established as though proved, and consequently the order denying appellant's motion must be affirmed.

" Order affirmed."

[Report : 180 F. 2d 314.]

Case No. 60

Nationality—Loss of—Naturalization—Naturalization Granted in Judicial Proceedings -Discovery of New Evidence after Date of Judgment Granting Naturalization—Power of Court to Revoke Naturalization—The Law of the United States of America.

FINUCANE *v.* BINDCZYCK.

United States, Court of Appeals of the District of Columbia Circuit. June 19, 1950.

THE FACTS.—The respondent became a naturalized United States citizen by virtue of an order of the Circuit Court of Frederick County, Maryland, dated December 2, 1943. Shortly thereafter the respondent made certain remarks to the effect that he had no love for the United States and would not fight for that country, whereupon the same court, within the same legal term, on a motion filed by the Immigration and Naturalization Service, reversed its previous order and invalidated the respondent's naturalization. The respondent having thereafter obtained a summary judgment in the District Court declaring him to be a United States citizen, the Chairman of the Board of Immigration Appeals appealed against that judgment. It was contended on his behalf that, notwithstanding that section 338 of the Nationality Act of 1940[1] contained elaborate provisions which had to be observed in proceedings for the cancellation of naturalizations and that these provisions had admittedly not been observed by the Circuit Court when invalidating the respondent's naturalization, a court of law was always entitled to set aside its own orders within the same term, and that orders for naturalization were in no way different in this respect from any other orders. On behalf of the respondent it was contended that section 338 of the Nationality Act of 1940 constituted a *lex specialis* governing denaturalization and was therefore the only legal provision applicable thereto, and that as the formal requirements therein contained had not been observed, it was not now open to the appellants to fall back upon the common law rule that a court of law was entitled to set aside its own orders, irrespective of their content, within the same legal term.

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[1] This section has been replaced by section 340 of the Immigration and Nationality Act of 1952.

Held : that section 338 of the Nationality Act of 1940 was cumulative in effect. It did not exclude the exercise by the courts of their common law powers to set aside their own orders within the same term. The summary judgment of the District Court declaring the respondent to be a United States citizen should accordingly be reversed. The Court said : " That Congress has the power to enact uniform laws governing denaturalization cannot be doubted. But the first question before us involves the extent to which Congress has exercised this power, and not whether the power exists to the extent which would be necessary in order to sustain appellee's position ; for only if we conclude that it has exercised this power so as to make the remedy thus provided exclusive of all others that may have heretofore existed, would we then have to decide whether the constitutional grant extended so far. Doubt has been expressed in that regard.

" Little has been written on the question before us, and so before we proceed to an examination of whatever authority there is on the subject, it will be helpful to place the problem in its proper posture. Stripped to its essentials the question is : Has Congress, by enacting a statute governing denaturalization, proscribed the power of a naturalizing court of proper jurisdiction to set aside, vacate, and assign for rehearing its own order of naturalization within the same term of court, in the same manner, and on the same grounds as any other of its judgments similarly assailed ?

" There are certain basic fundamentals with which we should first acquaint ourselves. These are :

" (1) An order of naturalization is like any other judgment of the court issuing the order.

" (2) Judgments of a court of record are appealable.

" (3) Under proper circumstances judgments of a court of record are subject to being opened up, modified, corrected, set aside, and vacated. The power of a court to so act, though much modified today by statute, existed at common law and has always been exercised in the judicial discretion of such court.

Case No. 60 *Contd.*

" (4) The proceeding to vacate a judgment, especially when made within the same term of court, is generally regarded as a further proceeding in the same action.

" (5) A statutory remedy is to be considered as cumulative of existing common law remedies, unless the contrary is so declared in express terms or by necessary implication.

" From the foregoing it would appear, therefore, that independently of any decisional law, the Circuit Court for Frederick County, Maryland, has the power to set aside and vacate its own naturalization order within the same term of court in the same way that it may set aside and vacate any other of its judgments. . . .

". . . Independently of any decisional law, we would hold in favor of the appellants because of the inherent and historical power of a court over its own judgments within the same term in which they were rendered ; because of the fact that it has been held by the Supreme Court that orders of naturalization are like any other judgments of the court issuing the order ; and because such powers of a court are not to be construed cut off unless by explicit language. But in addition the weight of authority favors the appellants, and it is the opinion of this court that section 338 of the Nationality Act of 1940 is cumulative in effect and does not exclude the other available remedies for setting aside and vacating naturalization orders as judgments at least while the issue is still in the course of its original proceeding."

[Report : 184 F. 2d 225.]

NOTE.—This case is concerned primarily with the interpretation of a national statute and, though considered of some general importance for the law relating to naturalization, is accordingly reported in a severely abridged form.

Case No. 61

Nationality—Loss of—Naturalization—Requirement of Good Moral Character—Statute Providing for Proof of Good Moral Character during Fixed Period Preceding Naturalization—Whether Court Entitled to Take into Account Crimes Committed Prior to Statutory Period—The Law of the United States of America.

MARCANTONIO *v.* UNITED STATES.

United States, Court of Appeals of Fourth Circuit.

December 16, 1950.

THE FACTS.—Section 307 (*a*) of the United States Nationality Act of 1940 provided, *inter alia*, that " no person shall be naturalized unless for at least five years he has been and still is a person of good moral character. . . ." The petitioner for naturalization had been living in the United States for many years and had several previous convictions for criminal offences, the last such conviction having been recorded against him in May 1942. He applied for naturalization in June 1947, and it was not disputed that since his last conviction in May 1942 he had been a man of good moral character. Nevertheless, the Court of first instance refused his application for naturalization on the ground only that he had been convicted of criminal offences committed more than five years earlier. The petitioner appealed against such refusal, and it was contended on his behalf that the Court of first instance was precluded by section 307 (*a*) of the Nationality Act of 1940 from taking into account crimes committed more than five years earlier, except in so far as it was entitled, within the wide discretion conferred upon it, to consider such crimes as bearing upon the question of good moral character within the five-year period provided by the Act.

Held : that the Court was entitled to consider any proper evidence having a reasonable tendency to prove or disprove good moral character, but that it was not entitled to add to the statute the test of crimes committed prior to the period expressly provided therein, and the Court of first instance having added to the statutory test in that manner, the judgment must be reversed and the case remanded with a direction to grant the appellant's petition for naturalization. The Court said :

" The learned judge below did not distinguish, we think, between considering evidence of crimes committed prior to the five-year period as bearing upon the question of character within that period and denying a petition for naturalization on the basis of such crimes. The former is permissible for the reason that the judge may consider any proper evidence having reasonable tendency to prove or disprove good character ; and the fact of petitioner's having committed serious crimes at any time during his life has a bearing on his character. It is not permissible, however, to base denial of naturalization on the commission of crimes prior to the five year period, for the effect of this is to add to the statute a condition which it does not contain. The test which the statute prescribes is good moral character as that term is generally understood, not the judge's idea of the ' type of man who ought to be admitted to citizenship ' ; and to deny naturalization when the required good character within the five year period and at the time of application is shown because the judge is of opinion that applicant is not of the type which should be admitted to citizenship because of crimes committed prior to the crucial period, is to add to the statute a test which Congress has not seen fit to impose. This the judge may not do. As said by this court in *Schwab* v. *Coleman*, 4 Cir., 145 F. 2d 672, 677, 156 A.L.R. 355 : ' While a

Case No. 61 *Contd.*

wide discretion is lodged in the judge who hears a petition for naturalization, this discretion cannot be exercised arbitrarily or in a manner which adds to the requirements contained in the act, which must be liberally construed in favor of the petitioner '.

" Pertinent in this connection is what was said by the Supreme Court in *Tutun* v. *United States*, 270 U.S. 568, 578, 46 S.Ct. 425, 427, 70 L.Ed. 738, speaking through Mr. Justice Brandeis, as follows : ' The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, s. 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate.'

" In *Petition of Zele*, 2 Cir., 140 F. 2d 773, 776, the Court of Appeals of the Second Circuit dealt with the precise question involved, in the following passage which was quoted with approval by this court in *Schwab* v. *Coleman*, *supra*, viz. : ' Under the law the burden is on the petitioner to establish good moral character only during the five-year period, not earlier. *Petition of Zele*, 2 Cir., 127 F. 2d 578 ; *United States* v. *Clifford*, 2 Cir., 89 F. 2d 184 ; *United States* v. *Rubia*, 5 Cir., 110 F. 2d 92 ; *In re Aldecoa*, D.C. Idaho, 22 F. Supp. 659, 661. And it has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a disbarring misdeed. *In re Trum*, D.C.W.D.Mo., 199 F. 361 ; *In re Centi*, D.C.W.D.Tenn., 217 F. 833 ; *In re Guliano*, D.C.S.D.N.Y., 156 F. 420 ; *United States* v. *Mirsky*, D.C.S.D.N.Y., 17 F. 2d 275 ; *In re Nagy*, D.C.S.D.Tex., 3 F. 2d 77 ; *Application of Polivka*, D.S.W.D.Pa., 30 F. Supp. 67. See, also, *In re Schlau*, 2 Cir., 136 F. 2d 480.'

" See also to the same effect *Yuen Jung* v. *Barber* . . ., *Daddona* v. *United States*, 2 Cir., 170 F. 2d 964 ; *Application of Murra*, 7 Cir., 178 F. 2d 670 ; *Petition of Gani*, D.C. 86 F. Supp. 683, 686 ; *Petition of Sperduti*, D.C., 81 F. Supp. 833.

" It appears from the record before us that there is no question as to petitioner's good character at this time and for the five year period that the statute prescribes, even though consideration be given to the prior crimes of which he has been guilty. That a man may turn from evil and rehabilitate his character is universally recognized ; and the record here leads irresistibly to the conclusion that this petitioner has really turned from a life of law violation to one of upright living. Indeed it is not disputed that the applicant was a man of good moral character during the five year period. The order appealed from will accordingly be reversed and the case will be remanded with direction to grant the petition for naturalization."

[Report: 185 F. 2d 934.]

Nationality—Loss of—Naturalization—Revocation—French Law—Revocation of Naturalization of the Wife of a Person Convicted of a Crime.

Case No. 62

In re BONAPACE.

France, Conseil d'État. October 20, 1950.

THE FACTS.—Article 111 of the French Nationality Code provides that, if facts come to light after naturalization showing that the person naturalized did not fulfil the condition required by law for naturalization, the naturalization decree can be revoked during the year following its publication. The complainant and his wife had been naturalized in April 1948. Subsequently the Ministry of Public Health and Population discovered that the complainant had in 1945 been convicted of a crime the commission of which disqualified the criminal from naturalization. The naturalization decree was accordingly revoked in March 1949, on the ground, with regard to the complainant, that he had been convicted of the crime in question, and, with regard to his wife, that in the circumstances she could not be considered to be of good character. The Conseil d'État was now asked to annul this decision.

Held: that the decision must be upheld with regard to the complainant and annulled with regard to his wife. The fact that the complainant had been convicted of a crime was not in itself sufficient to show that his wife was not of good character.

[Report: *Revue critique de Droit international privé*, vol. 40 (1951), p. 474.]

NOTE.—See, for another case of revocation of naturalization, *In re Albonico* (*ibid.*, p. 619), decided by the Conseil d'État on December 23, 1949.

Loss of Nationality—Dual Nationality—Voting in Political Elections in a Country of the Other Nationality.

See Case No. 63 (*Miranda* v. *Clark, Attorney-General, et Al.*).

VIII.—Double Nationality

Case No. 63 **Dual Nationality—Voting in Political Election by Person under Age of 21—Voluntary Expatriation—Whether Voting in Election Held in Country of One Nationality Entails Loss of Nationality in the Other—The Law of the United States of America.**

MIRANDA *v.* CLARK, ATTORNEY-GENERAL, *ET AL.*

United States, Court of Appeals of the Ninth Circuit.
February 15, 1950.

THE FACTS.—The appellant, whose parents were of Mexican nationality, was born in the United States of America, and accordingly he possessed the nationalities both of the United States and of Mexico. At the age of 5 he was taken to Mexico by his parents who took up residence in that country. The appellant himself resided with them, and when he was 20 years of age he voted in a political election at his place of residence in Mexico. Shortly thereafter, and before attaining the age of 21, he attempted to enter the United States as a United States citizen. Having been prevented from so doing, on the ground that he had lost his United States nationality by virtue of section 401 (*e*) of the Nationality Act, 1940, which provides that a national of the United States, whether by birth or naturalization, shall lose his nationality by "voting in a political election in a foreign state", he instituted proceedings for a declaration that he was a United States citizen. The Court of first instance having refused to make the declaration, the appellant now appealed. It was contended on his behalf that a person of dual nationality does not lose his United States citizenship by voting in a political election outside the United States before attaining the age of majority and that, as he was only 20 years of age when he voted in a political election in Mexico, he was entitled to a declaration that he was still a United States citizen. The defendant, the Attorney-General, relied on section 403 (*b*) of the Nationality Act, 1940, which provides expressly that "no national under eighteen years of age can expatriate himself . . .", and that, *e contrario*, a person over that age, even if below the age of majority, is capable of expatriating himself, and that, accordingly, the appellant was not entitled to the declaration sought.

Held : that the appellant had voluntarily expatriated himself and was not entitled to a declaration that he was a United States citizen. The Court said :

"The parties are in agreement here that the question presented on this appeal is whether appellant, who was born in the United States and when about five years of age was taken to Mexico (the country of his parents' origin) and who thus became subject to a dual nationality, can expatriate himself by voting (at the age of 20) in a primary local election in his then city of residence in Mexico.

" The controlling provisions of law are Sections 801 and 803 of Title 8 U.S.C.A., these being part of the so-called Nationality Act of 1940. Section 801 provides that a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by: (*e*) 'Voting in a political election in a foreign state. . . .'

" Section 803 (*b*) provides: 'No national under eighteen years of age can expatriate himself under subsections (*b*) to (*g*), inclusive, of section 801'.

" In our view, the statutory provisions above noted leave no doubt that Congress thereby removed, and intended to remove, the barrier to a voluntary expatriation by a national who is over the age of eighteen years. After arriving at that age a voluntary act of expatriation binds him, sec. 803 (*b*). Any other construction of the language of the Act (as applied to the situation in the case at bar) would amount to an amendment of the Act by judicial interpretation and import into it obscurities which we believe would thwart a clearly expressed Congressional will.

" The provisions of law we have quoted do not result in the rights of citizenship being 'destroyed by ambiguity' because that sort of vice is not present in these plain and simple provisions of the 1940 law. They bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation.

" Appellant summarizes his argument as follows: 'A person born in the United States and taken during his minority to the country of his parents' origin and who became subject to a dual nationality, does not lose his citizenship in the United States by voting in a contested local political election during his minority, if on attaining majority he elects to return to the United States, assume his obligations and retain his American citizenship'.

" In support of his contentions appellant relies on four cases—*Perkins* v. *Elg*, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320; *Attorney General etc.* v. *Ricketts*, 9 Cir., 165 F. 2d 193; *Inouye et Al.* v. *Clark et Al.*, D.C., 73 F. Supp. 1000, and *United States ex rel. Baglivo* v. *Day*, D.C.S.D., N.Y., 28 F. 2d 44. It is to be noted that in each of these cases the fact situation with which they dealt was entirely different from that presented in the case at bar. With the exception of the *Inouye* case they are concerned with happenings and events which occurred prior to the enactment of the Nationality Act of 1940 which was designed to clarify the then existing law by clearly specifying

Case No. 63 Contd. a definite method of terminating dual citizenship and of electing United States nationality.

"A brief reference to our decision in the *Ricketts'* case indicates that it dealt with rights and privileges which were not affected by the later enacted 1940 Nationality Act. . . .

"As pointed out by the court in the *Inouye* case, 73 F. Supp. at page 1002, the principles applicable to a renunciation of citizenship by a Japanese of the age of seventeen years (where the statute is silent as to the age when a person may make such a renunciation) are not applicable where the statute specifically provides that a national who has reached the age of eighteen years can expatriate himself under section 803.

"The *Baglivo* case (decided in 1928) involved the question of whether a native born minor renounced his American citizenship by serving in the Italian army. For the reasons suggested in our reference to the *Inouye* case the *Baglivo* case is inapposite.

"The holding in the *Elg* case (1939) must be appraised in light of the subsequent enactment of the 1940 Nationality Act which carefully reduced to specific statutory form a description of the various acts which of themselves amount to a voluntary expatriation. Voting in a political election in a foreign state was one of these acts. Here the appellant voted in a political election in a foreign state when he was twenty years of age. That act amounted to a voluntary expatriation under the 1940 law.

"The judgment of the lower court was correct and it is affirmed."

[Report: 180 F. 2d 257.]

XI.—Nationality of Corporations

Case No. 64

Nationality—of Corporations—Seat—Control.

In *Brasserie Walsheim* v. *Brasserie Lorraine et Administration des Domaines* (*Dalloz hebdomadaire*, 1950, *Sommaires*, p. 60) the Tribunal Civil of Metz *held*, on June 16, 1950, that a company whose seat was outside France must be considered to be a foreign company in the absence of proof that it was controlled by French nationals, since the establishment of the seat in a country established a presumption, in the absence of contrary proof, that it owed political allegiance to that country.

C—ALIENS

I.—Admission of Aliens

Aliens—Admission of—" Prohibited Immigrants "—Whether Acquiring Domicile—The British Commonwealth of Nations—The Law of South Africa. **Case No. 65**

VAN RENSBURG *v.* BALLINGER.

South Africa, Transvaal Provincial Division of the Supreme Court.

(Murray, de Villiers and Roper JJ.)

August 28–31, 1950.

THE FACTS.—Ballinger, a British subject by birth, arrived in South Africa in 1928, as adviser to a native trade union. The Minister of the Interior at that time made an order in accordance with Act 22 of 1913 declaring him to be a prohibited immigrant. However, no steps to deport him were taken, and he was thereafter issued with various permits of temporary residence. Representations having been made to the Minister, the original order of 1928, though not withdrawn, was relaxed to the extent that he was allowed to travel freely in the Union, provided he undertook to leave the country within a reasonable time if the Government required him to do so.

An Act of 1927 had laid down the definition of a Union national:

" The following persons shall be Union nationals—

" (*a*) a person born in any part of South Africa included in the Union who is not an alien or a prohibited immigrant under any law relating to immigration;

" (*b*) a British subject whose entry into any part of South Africa included in the Union was in accordance with any law governing at the time of such entry the immigration of persons into that part of South Africa and who has for a period of at least two years thereafter been continuously domiciled in the Union so long as he retains that domicile."

From 1928 on Ballinger continued to live in South Africa, with temporary visits abroad. He married a Union national, and carried a Union passport. He registered as a Parliamentary elector, and was appointed a Commissioner of Oaths in 1945.

In 1948 Ballinger offered himself as a candidate for the South African Senate, and was elected as a native representative by a large majority. Van Rensburg had stood for the same seat. He challenged Ballinger's election on the grounds that he did not fulfil the qualifications required of a senator in

Case No. 65 *Contd.* the South Africa Act, or Act 12 of 1936, which provided for native representation in the Upper House. Amongst other provisions the latter statute provided that a senator must:

" (*d*) be a person of European descent who has acquired Union nationality whether—

(i) by birth or

(ii) by domicile as a British subject or

(iii) by naturalisation, or otherwise in terms of Act 40 of 1927 or Act 14 of 1932."

It was admitted that Ballinger was a British subject. However, the petitioner argued that as the respondent had been declared a prohibited immigrant he was incapable of acquiring a South African domicile.

Held (*per* Murray J.): " The onus, in this matter, lies on the petitioner to show that the respondent was not a South African national. The fact that the respondent had resided permanently in the Union since 1928 was not disputed at all; nor do I understand that the respondent's allegation, that he did so throughout with the intent to make the Union his domicile, was seriously challenged. Even if it had been challenged, I do not think the challenge could have succeeded. I accept the respondent's allegation which all the facts above mentioned fully bear out, that he came to South Africa with the *animus manendi* and continued with that mental attitude throughout."

It was argued by counsel for the petitioner that Ballinger's entry into the Union was not "in accordance with any law governing at the time of such entry the immigration of persons into that part of South Africa". (Sec. 1 (*b*) of Act 40 of 1927. See below.[1]) Counsel did not consider that Sec. 1 (*b*) could be interpreted literally, for, if so, it conferred extraordinary privileges on British subjects, even over people born in the Union (see sec. 1 (*a*)). He contended that the word " entry " must be interpreted as both " entry " and " residence "; and that both this " entry " and " residence " must have been unrestricted and unconditional.

Having summarized this argument, the Judge continued: " I am entirely unable to see that any absurdities or unforeseen consequences would follow from giving this sub-section (1 (*b*)) its literal meaning and doing the same to each of the other sub-sections. . . . If the Legislature had meant to say that a man could only acquire Union nationality if he entered without restriction or remained without restriction or had intended to say that he could not acquire a Union domicile even if a British subject provided that a prohibition order declaring him a prohibited immigrant had been served, it would have been the simplest matter for the Legislature to say so."

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[1] Act 40 of 1927, Sec. 1 reads: " The following persons shall be Union nationals—

" (*a*) a person born in any part of South Africa included in the Union who is not an alien or a prohibited immigrant under any law relating to immigration.

" (*b*) a British subject whose entry into any part of South Africa included in the Union was in accordance with any law governing at the time of such entry the immigration of persons into that part of South Africa and who has for a period of at least two years thereafter been continuously domiciled in the Union so long as he retains that domicile."

" As I see the position, the main absurdity was this, that a prohibited immigrant could, by domicile, become a Union national and so actually become a member of the Legislature and pass Union laws. Any such absurdity is due not to accepting the literal wording of the Act but to the administrative action in enforcing the Act. Normally a prohibited immigrant should be refused entry or be deported practically at once —if the authorities allow the indefinite residence of the person in the Union, as in the present case, for a period of over twenty-two years, I can see no glaring absurdity in regard to the section which required the literal words to be departed from. To my mind, the wording of that section is perfectly clear and, in fact, not only the entry of the respondent in this case into the Union was in entire compliance with the Union Immigration Laws but his continued residence in the Union was also in compliance with these laws. These laws permitted the Minister either to exempt a prohibited immigrant or to grant him temporary permits in the terms provided by the regulation. This the Minister has done and, to my mind, respondent has satisfied this portion of sec. 1 (*b*)."

It was further argued by counsel for van Rensburg that no one could acquire a domicile in a country from which he was at any moment liable to deportation as a prohibited immigrant.

Murray J. said : " There seems to be ample authority for the view that a prohibited immigrant is not by virtue of the mere prohibition debarred from acquiring a domicile in this country " (*Principal Immigration Officer* v. *Medh* (1928, A.D. 451) and *Kara* v. *Principal Immigration Officer* (1931, C.P.D. 149 at 153) ; *Joosub* v. *Salaam* (1940, T.P.D. 177) etc.). . . . I find it difficult, if not impossible, to reconcile the Minister's action in allowing the respondent to enter and remain indefinitely in the Union, subject to good behaviour as construed by the Minister, with a belief on the Minister's part that the respondent was undesirable as an entrant or resident. . . . The Minister had definitely promised respondent that subject to good behaviour the latter could stay in the Union permanently. This promise rendered it possible for the respondent to determine the position for himself and conferred on him the ability to carry out his *animus manendi* and acquire Union domicile.

" Apart from authority, I have come to the conclusion on general principles that the power of a higher authority to terminate a person's residence in a particular area cannot *per se*

Case No. 65 *Contd.* affect the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised, then naturally with the disappearance of the physical residence the domicile thus acquired is brought to an end. Until such termination the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may (I do not say must) be taken to realise the precarious character of his residence and consequently may not be held to have formed the intention of making his home in such area."

Hence, in the view of the Court, Ballinger had acquired a Union domicile, and his election to the Senate could not therefore be impugned in that regard.

De Villiers J. delivered a concurring judgment.

[Report : (1950) 4 S.A.L.R., p. 427.]

Case No. 66 Aliens—Admission of—Issue of a Visa—Whether Ensuring the Right of Entry.

In re Chonqui Chong.

Mexico, Supreme Court. January 13, 1950.

The Facts.—Andrés or Armando Chonqui Chong sought federal protection (*amparo*) against certain acts of the Secretary of Foreign Relations, the Mexican Consul-General in San Francisco, and the Secretary of the Interior. He charged that when he disembarked in San Francisco *en route* from China to Mexico, he was detained by United States immigration authorities acting at the request of the Mexican Consul-General, that the visa granted to him by the Mexican Embassy in Nanking, China, had been cancelled by the Secretary of Foreign Relations, and that an order for his deportation had been issued by the Secretary of the Interior. The federal authorities took the position that the visa had not been properly issued to the complainant as he had lost his immigrant status by reason of having returned to China and remained there more than the two years' absence from Mexico permitted under the Mexican immigration law ; they denied the other charges. The District Court denied the petition for *amparo* and rejected the other charges.

Held : that *amparo* must be granted. Authorization for an alien to enter the country will be respected notwithstanding a question as to the circumstances under which such authorization was made. The Court said :

1. " The bases of the complaint are as follows : (*a*) the Consul-General of Mexico in San Francisco without the power to do so but acting on instructions from the Secretary of Foreign Relations cancelled the Mexican visa granted to

Chonqui by our Embassy at Nanking on the pretext of preventing the unlawful use of the passport which was in the possession of the complainant, thereby violating the complainant's right to continue his trip to this capital and placing him in the position of being subject to deportation ; (*b*) the charges brought by the complainant were rejected without submission to formal judicial proceedings ; (*c*) the deportation of the complainant could not be legally undertaken in view of the fact that the complainant had been authorized to enter the country, as evidenced by his possession of a passport and visa which created rights in his favor that might not be nullified by an order of the Secretary of the Interior.

2. " From the evidence presented to the Court, it appears that the Secretary of Foreign Relations accepts responsibility only for the cancellation by the Mexican Consul in San Francisco of the visa issued by the Mexican Embassy in Nanking, which action had been taken in pursuance of Article 68 of the General Law on Population which permits legal immigrants to absent themselves from the country for a maximum period of two consecutive years, it being shown that Armando Chong having remained abroad beyond this period had lost his immigrant status and could not reenter the country. For his part, the Secretary of the Interior denied the charge that the Department of Migration had issued an order for the deportation of the complainant.

" The decision of March 28, 1949, reached by unanimous vote of the First Chamber of the Supreme Court in Case No. 7498–948, *José Wong*, is relevant to the one charge admitted by the Secretary of Foreign Relations. The decision may be quoted briefly as follows : '. . . it may be observed immediately that whether or not José Wong had lost his previous right of residence, he acquired the right to reenter the territory of the Republic of Mexico from the moment when the Mexican Ambassador to China, notwithstanding a question as to his legal capacity to authorize the admission of aliens into Mexico, granted a visa to this alien. A right was created in the appellant's favor which must necessarily be respected by the appropriate authorities, apart from any consideration of the official responsibility which the said diplomat may have incurred by authorizing something beyond his legal capacity. To maintain the contrary would constitute a flagrant violation of Articles 11, 16, 21, and more particularly, 14, of the Constitution of the Republic, by depriving the complainant of a right without the intervention of judicial proceedings before the competent courts and the completion of the necessary procedural formalities. It follows, then, that the judgment under appeal must be reversed and *amparo* granted, but with the understanding that the effect of the same is not to be construed as constituting the regularization of the immigrant status of the complainant, who has the

Case No. 66 *Contd.* obligation to regularize his presence in the country in conformity with the relevant laws.' The position taken by this Chamber of the Supreme Court in the decision quoted above must be affirmed in the present case, for it is evident that Andrés or Armando Chonqui Chong acquired the right to enter the country by virtue of the visa granted by the Mexican Ambassador in Nanking, irrespective of the question of the Ambassador's legal capacity in this particular instance. The right of the complainant to reside in the country is subject, however, to the Secretary of the Interior's determination as to whether the complainant has satisfied the requisites established by the General Law on Population. It follows, then, that the authorization granted by the Secretary of Foreign Relations to the Mexican Consul in San Francisco to cancel the said visa resulted in an obvious violation of the individual guarantees the protection of which is sought by the complainant in this *amparo* proceeding and that *amparo* will accordingly be granted. With reference to the other charges brought against the Secretary of Foreign Relations and the Secretary of the Interior which have been denied by the said authorities and for which neither the complainant nor his counsel have submitted adequate proof, the decision of the District Court is affirmed."

[Report: 103 *Semanario Judicial de la Federación* (5a Época), pt. 1, p. 299.]

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State

Case No. 67 **Aliens—Position of—Liability for Military Service—Military Service as Condition of Eligibility for Naturalization—Deportation and Suspension thereof—The Law of the United States of America.**

McGrath, Attorney-General, *et al.* v. Kristensen.

United States, Supreme Court.

(Vinson C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton and Minton JJ.)

December 11, 1950.

The Facts.—The respondent, a Danish citizen, entered the United States in August 1939, as a temporary visitor for 60 days. The outbreak of war prevented his return to Denmark. Successive extensions of stay were granted, and deportation proceedings begun in May 1940 were stayed for the duration of the war. In March 1942 he applied for and obtained relief from liability for military service under section 3 (*a*) of the Selective Training and Service Act of 1940 which provides in part that " every male citizen of the United States, and every other male person residing in the United States shall be liable for training and service in the forces of the United States (unless) he has made application to be relieved from such liability, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States ". In June 1946 the warrant of deportation previously issued was withdrawn in order to enable the respondent to submit an application for suspension of deportation. The application was refused on the sole ground that the respondent, by applying for relief from liability for military service, had rendered himself ineligible for citizenship which, as was contended on behalf of the Government, brought into play section 19 (*c*), as amended, of the Immigration Act of 1917 which provides in substance, and as far as here material, that the Attorney-General may suspend the deportation of an alien if he is not ineligible for naturalization, the implication being that no such suspension may be granted where the alien is not eligible for naturalization. The respondent thereupon instituted proceedings for a declaratory judgment that the Attorney-General must determine his application for suspension of deportation on the basis that he was eligible for naturalization on the ground that when applying for relief from liability for military service in 1942 he was not " residing " in the United States (as required by section 3 (*a*) of the Selective Training and Service Act of 1940) and therefore not liable for service under that Act, with the result that he could not be ineligible for naturalization.

The District Court having dismissed the respondent's suit, and the Court of Appeals having reversed the District Court,

Held (*per Curiam*, Douglas J. dissenting, and Black and Jackson JJ. concurring): that, as the respondent did not " reside " in the United States when submitting his application for relief from liability for military service, he remained eligible for naturalization and was entitled to a declaratory judgment that his application for suspension of deportation should be determined on the basis that he was eligible for naturalization, and that, consequently, the judgment of the Court of Appeals must be affirmed. The Court said:

" *Eligibility for Naturalization.*—Under s. 3 (*a*) of the Selective Training and Service Act of 1940, Kristensen was liable for service if ' residing ' in the United States within the meaning of the Act. Section 3 (*a*) also provided that if he applied ' to be relieved from such liability ' as a subject of a neutral country he would be excused from service but would thereafter be debarred from our citizenship.

" If Kristensen was not ' residing ' at the time of his

Case No. 67 *Contd.*

application for relief, he could not then have had ' such liability ' for service. If there was no ' liability ' for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the ' application ' referred to in the statute as ' such application '. ' Such application ' refers to an application to be relieved from ' such liability '. As there was no ' liability ' for service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved.

" The question, then, is whether Kristensen was ' residing ' within the meaning of the Selective Training and Service Act of 1940 and regulations issued thereunder, at the time of his application, March 30, 1942. As we conclude that he was not a resident under the Act at the time of his application for relief from military service, we do not decide whether Denmark was a neutral country. Nor need we determine whether the bar against citizenship has been removed by the termination of the Selective Training and Service Act of 1940.

" The phrase of section 3 (*a*), ' every other male person residing in the United States ', when used as it is, in juxtaposition with ' every male citizen ', falls short of saying that every person in the United States is subject to military service. But the Act did not define who was a ' male person residing in the United States ' liable for training and service after December 20, 1941. 55 Stat. 845. Such precisiveness was left for administrative regulation. Section 10 (*a*) and (*b*), 54 Stat. 893, 894, authorized the President to prescribe rules and regulations for the Act with power of delegation. The President prescribed the first regulations on September 23, 1940, and authorized the Director to prescribe amendments. Exec. Order 8545, 3 CFR, 1943 Cum. Supp., 719, 722. Amendments promulgating the regulations here applicable were issued, effective February 7, 1942, 7 Fed. Reg. 855. Under these regulations it would seem that Kristensen, who never declared an intention to become a citizen of the United States and who entered the United States in August 1939, was not classified as a resident neutral alien until May 16, 1942. Otherwise, there would have been no occasion for s. 611.13 (*b*), which declares the male alien who remains in the United States after May 16, 1942, to be a resident. Until that date he was in the same category as the newly arrived nondeclarant alien who, under the regulations and the Act, did not become a resident for three months. The application for relief from service was made on March 30, 1942.

" The regulations, quoted above, either made an alien in Kristensen's situation a non-resident of the United States for the purpose of the Selective Training and Service Act, between

February 7 and May 17, 1942, or they were non-determinative of status in that period. In the absence of a determinative regulation, the meaning of the word ‘ residing ’ in s. 3 (*a*) requires examination. The meaning of that word, of course, depends upon the meaning of ‘ residence ’. ‘ Residence ’ sometimes equals domicile, as in voting. Again, as in taxation, one who is not a mere transient or sojourner is a ‘ resident ’. s. 29.211–2, Income Tax Regulations. The definition varies with the Statute. Restatement, Conflict of Laws (1934), s. 9, comment *e*. See *Carroll* v. *United States*, 133 F. 2d 690, 693. In a naturalization case where eligibility depended upon the required residence in the United States, it was held that an enforced service in the German army 1914–1918 and subsequent foreign residence until 1921 on account of lack of means and inability to obtain a passport did not break the continuity of American residence. The court there said :

> ‘ We shall not try to define what is the necessary attitude of mind to create or retain a residence under this statute, and how it differs from the choice of a " home ", which is the test of domicile. Frankly it is doubtful whether courts have as yet come to any agreement on the question. But there is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it.’

" When we consider that s. 3 (*a*) was obviously intended to require military service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by the conditions of the times was residence within the meaning of the statute.

" The judgment of the Court of Appeals is *Affirmed*."

[Report : 340 U.S. 162.]

NOTE.—Although this case is primarily concerned with the application of a municipal statute, it has been reported in some detail as bearing on the question of military service by aliens.

Aliens—Position of—Enemy Aliens—Persons Assimilated to Enemy Aliens. **Case No. 68**

PESSIS *v.* WIDOW GRANDJEAN AND OTHERS.

France, Court of Cassation, Civil Division. May 4, 1950.

THE FACTS.—The appellant, a Roumanian national, had brought an action for the recovery of possession of premises which he had been forced to leave during the German occupation of France, in reliance on the Ordinance of November 14, 1944, which entitled former occupants so to recover possession. The Court of Appeal of Paris, on June 24, 1947, rejected that claim on the ground that enemy aliens were not entitled to the benefits of the Ordinance of November 14, 1944. It was now contended on behalf of the appellant that the Ordinance applied to all tenants who had been evicted during the occupation, irrespective of nationality, and, further, that Roumania had never been at war with France, and that Roumanian nationals could therefore not be regarded as enemy aliens.

Held : that the appeal must be rejected. The Court said : " The Ordinance of 14 November 1944, which was enacted while hostilities were still in progress, was based on that of 12 November 1943 concerning the putting into effect of the United Nations Declaration of 5 January 1943. That Declaration was concerned with measures to check the expropriations carried out by the Governments with whom the United Nations were at war. Enemy nationals were not amongst the persons protected by that Declaration, and are therefore excluded from the benefits of the Ordinance of 14 November 1944. Roumania was amongst the nations at whom the United Nations Declaration was aimed. Its nationals accordingly cannot benefit from the terms of the Ordinance of 14 November 1944, which applied that Declaration."

[Report : *Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 578.]

NOTE.—See, to the same effect, *Cappellin* v. *Coppio* (*ibid.*, *Sommaires*, p. 42), decided by the Court of Appeal of Paris on March 16, 1950, where it was held that an Italian Jew, as an enemy national, could not invoke the Ordinance of November 14, 1944. And see *Époux Buisson* v. *Moses* (*ibid.*, *Sommaires*, p. 38), decided by the Civil Division of the Court of Cassation on March 24, 1950, where the Court held that a person who was a German national at the time of eviction was not entitled to invoke the Ordinance of November 14, 1944, even though he had subsequently acquired French nationality. The Court added that it would have held otherwise if the plaintiff had lost German nationality by virtue of German racial legislation, and could have been considered to be stateless. See also *Consortium de Groupage Fer et Route* v. *Eminente* (*ibid.*, *Jurisprudence*, p. 483), decided by the same Court on May 16, 1950, where the Court held that the Ordinance of April 21, 1945, concerning the annulment of legal acts executed under constraint during the German occupation of France, was based on the United Nations Declaration of November 12, 1943, that that Declaration did not protect enemy nationals, and that an Italian Jew could accordingly not invoke the benefits of the Ordinance of April 21, 1945. And see, to the same effect, *Mallah* v. *Antuori* (*Revue critique de Droit international privé*, vol. 39 (1950), p. 578), decided by a plenary session of the Civil Division of the Court of Cassation on March 1, 1950.

See, however, the decision of the Civil Division of the Court of

Cassation of June 27, 1950, in *Legendre* v. *Neumann* (*ibid., Sommaires*, p. 62), where the Court held that a Roumanian national was entitled to the benefits of the Ordinance of April 21, 1945, since that Ordinance was not applicable only to French nationals, and since it had not been proved that a state of war existed between Roumania and France, and the plaintiff could therefore not be regarded as an enemy alien. And see also *Solmsen* v. *Vergnol* (*Revue critique de Droit international privé*, vol. 39 (1950), p. 579), where the Civil Division of the Court of Cassation held that the Ordinance of November 14, 1944, could be invoked by a German Jew who had volunteered for the Foreign Legion and had thus demonstrated his desire to fight the German methods of expropriation.

iii.—Treatment by and Responsibilities of the Receiving State

Aliens—Treatment of—Refugees—Geneva Convention of 1933 Concerning the Legal Status of Refugees. **Case No. 69**

Lartoux *v.* Ministère Public.

France, Court of Appeal of Pau. June 12, 1950.

The Facts.—The plaintiff had, in conformity with Article 33 of a Law of October 28, 1946, concerning compensation for war damage, requested an authorization to acquire premises damaged during the war and the right to compensation attached thereto. On August 31, 1949, the Tribunal civil de Bayonne granted the authorization. The procureur général now appealed from that decision. He contended that the present owner, a stateless person named Ivanoff, was not entitled to compensation for war damage, since the Law of October 28, 1946, excluded aliens from its benefits, since only an express legal provision could derogate from that general exclusion, and no such provision covered stateless persons.

Held : that the appeal must be rejected. Stateless persons enjoyed, by virtue of the Geneva Convention of 1933, the treatment granted to the most-favoured aliens. There were aliens who, by virtue of a reciprocity Convention, were entitled to compensation for war damage. The Court said :

" The rights of a stateless person are not solely determined by the municipal law which he invokes, but also by the general rules governing his status, which derive from international Conventions sanctioned, in their turn, by French law. That view is in conformity with Article 26 of the Constitution. . . .

Case No. 69 Contd.

Article 14 of the Geneva Convention of 28 October 1933 provides:

> 'The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity.'

On the basis of that text and the spirit of the Geneva Conventions, the rights of a stateless person come into existence as soon as their exists a reciprocity agreement granting certain rights to an alien. It is not necessary that that right be granted to all aliens. . . . It is not denied that reciprocity agreements exist between France and certain foreign countries. On the other hand, Ivanoff fulfils all other conditions required by law to justify the status of stateless refugee."

[Report: *Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 459.]

Case No. 70

Aliens—Treatment of—Refugees—Geneva Convention of 1933 Concerning the Legal Status of Refugees—Nature of Legal Status Granted by Convention.

PELIZZARI *v.* COLL.

France, Tribunal Paritaire Cantonal of Muret.

December 22, 1950.

THE FACTS.—The plaintiff was the owner of land of which the defendant was tenant. On April 30, 1947, he gave the latter notice. The defendant failed to vacate the premises and invoked an Ordinance of October 17, 1945, as amended by a law of April 13, 1946, in support of his right to security of tenure. The present action was thereupon instituted. It was contended on behalf of the plaintiff that Article 61 of the Ordinance relied upon excluded aliens from the benefits of its provisions, that the defendant was a Spanish national, that the Franco-Spanish Convention of 1862 and the interpretative agreement of 1933 did not assimilate Spanish nationals to French nationals in the matter of rural leases, and that the defendant could accordingly not invoke the Ordinance of 1945. The defendant did not deny that Spanish nationals could not invoke the benefits of the Ordinance, but claimed that as a political refugee protected by the Geneva Convention of 1933 he was in a more favourable position.

Held: that the defendant could be evicted. The Geneva Convention of 1933 entitled refugees to the treatment given to other aliens of the same nationality, not to that given to the most-favoured alien. The Court said:

" Article 1 of the Decree of 15 March 1945 provides that the benefit of the Convention concerning the international status of refugees shall be extended to Spanish refugees. Article 14 of that Convention, adopted on 28 October 1933 and approved in France by a decree of 3 December 1936, provides as follows:

> 'The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity.'

The question at issue is the exact interpretation of that provision.

"The intention of the legislature was clearly to ensure that a refugee who loses the position of a national in relation to the law of his country and thus cannot provide a guarantee of reciprocity, shall not be prejudiced by that fact in comparison with his compatriots resident in France. It assimilates the refugee not to French nationals, but to compatriots who still enjoy the protection of their national law. It does not appear to have been the intention of the legislature nor does it seem to be in the general interest that political refugees of whatever origin, to whom France traditionally offers asylum, should be placed on a footing of equality with French nationals."

[Report: *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 328.]

Aliens—Treatment of—Acquisition of Domicile—Access to the Courts—Fulfilment of Citizenship Duties Towards Home Country—Whether an Impediment to Invoking the Jurisdiction of Local Courts—The Law of South Africa. **Case No. 71**

GWAMBE *v.* GWAMBE.

South Africa, Transvaal Provincial Division.

(Maritz J.P.; Malan J.)

April 14, 21, 1950.

THE FACTS.—Gwambe was born in Portuguese East Africa. He became a native minister and moved to the Transvaal in 1920. He married a South African woman, and came to regard the Union as his permanent home. He held a valid South African passport, but paid his taxes to the Portuguese Government. In 1950 he sued for a divorce in the Native Court. He was non-suited on the ground that he had not acquired a Transvaal domicile. Gwambe appealed.

Held (*per* Malan J.): that the appeal must be allowed. Gwambe was resident in the Transvaal, and intended to remain there. Both of the elements necessary for the acquisition of a domicile of choice thus existed. "But", continued the Judge, "the questions which remain to be determined are whether the fact that the plaintiff still owes allegiance to his country of origin and cannot become naturalized in the Union

Case No. 71 *Contd.*

and the fact that his right to remain there may at any time in the discretion of the Union authorities be terminated, renders the plaintiff incapable of forming the necessary intention to remain here indefinitely."

As regards the first, Malan J. pointed out that domicile and allegiance were separate questions ; and that a man might acquire a new domicile without divesting himself of his old nationality. In answering the second problem he approved of the English decision in *Boldrini* v. *Boldrini* (L.R. (1932), P.D. 9), as followed in the South African case of *Joosub* v. *Salaam* ((1940), T.P.D. 177) ; and he held that the danger of deportation for misbehaviour did not prevent the acquisition of a domicile of choice, *animo et facto*. The appeal, therefore, was allowed.

[Report : (1950), 2 S.A.L.R. 643.]

NOTE.—Although this case is primarily concerned with what is essentially a question of private international law, it has to some extent a bearing upon the position of aliens and their access to courts.

Case No. 72

Aliens — Treatment of — Equality before the Law — Child Brought to Canada to Escape Execution of a Valid Decree as to Custody by a United States Court—Whether a Canadian Court has the Right to Re-Hear the Issue of Custody—Position of Aliens before Canadian Courts.

McKEE *v.* McKEE.

Canada, Supreme Court.

(Kerwin, Taschereau, Kellock, Estey, Locke,
Cartwright, and Fauteux JJ.)

June 6, 1950.

THE FACTS.—Mr. and Mrs. McKee were married in 1933. They were both American citizens and had always lived in the United States. A son was born to them in 1940, but a few months later the couple separated. They entered into a separation agreement which stated, *inter alia*, that neither parent was to remove the child from the United States. In 1942 the husband was granted a divorce by the Superior Court of California in the County of Los Angeles. Custody of the child was awarded to him, though the boy was to spend three months a year with his mother. Further application was made to the same Court by Mrs. McKee in 1945, and full custody of the child was granted to her, with a reasonable right of visitation on the part of the father. Mr. McKee carried an appeal to the Supreme Court of California, but no alteration in the new Order was granted. This Order, because of the legal proceedings, only came into force in January 1947.

In December 1946 Mr. McKee heard of the failure of his appeal; so he moved to Ontario, in Canada, with the child. His former wife neither knew of, nor consented to this move. When she discovered what had happened she commenced habeas corpus proceedings in Ontario.

When the case eventually came up for trial, the point at issue was: "Who is to have custody of the infant, Terry Alexander McKee, as between the said Evelyn McKee and the said Mark T. McKee?" It was argued by Mrs. McKee that custody should be awarded to her in compliance with the decree of the Californian Court. The child had been taken out of the valid jurisdiction of that Court, so as to deny her her lawful right to custody. Wells J., in the Court of First Instance, felt, however, that he was bound to investigate the matter at length, and that the Californian judgment carried no more than persuasive weight in Canada. In the final event he granted custody to the father. The mother took the case to the Ontario Court of Appeal, and, failing there, she appealed to the Supreme Court of Canada.

Held (by the majority, Kerwin, Estey, Locke and Cartwright JJ.; Taschereau, Kellock and Fauteux JJ. dissenting): that the appeal must be allowed. The Californian judgment was not absolutely binding in Canada, but the Lower Courts had not attached sufficient significance to it, and to the circumstances surrounding the child's presence in Canada. The minority took the view that the appeal should be dismissed. The duty of the Court was to re-examine the whole issue, and award custody in the best interests of the child. This was what the Court would have been bound to do if the parties to the proceedings had been Canadian citizens, and in a matter such as this alien friends were possessed of the same rights of protection by the Courts as Canadian nationals.

In delivering the judgment of the majority Cartwright J. said: "In my view it was rightly held by Wells J. and the Court of Appeal that the judgement of a foreign Court as to the custody of an infant need not as a matter of binding obligation be followed in our Courts, although great weight must be given to it. . . .

"In my respectful opinion, however, no case to which we were referred is authority for the proposition for which counsel for the respondent was forced to contend; that where, as in the case at bar, an infant and both of his parents are citizens of a friendly foreign state in which they are all domiciled and have always resided, when the question of such infant's custody has been fully litigated in the Courts of such state, and those Courts after full and careful hearings have reached a decision that one of the parents is to have custody, the other parent upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the

Case No. 72 ***Contd.***

sole purpose of avoiding obedience to the judgement of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been ratified by such Court, becomes entitled as of right to have the whole question re-tried in our Courts, and to have them reach a new and independent judgement as to what is best for the infant. . . ."

The judge approved the statement of the Chief Justice for Ontario, in an earlier hearing of the case, that in circumstances such as those in issue: "Any jurisdiction to deal with the infant that an Ontario Court may have acquired as the result of such conduct, it should exercise only for the purpose of returning the child, in proper custody, to the country whose subject he is". The majority of the Court therefore reversed the decision of the lower Courts.

The dissenting judgment of Taschereau, Kellock and Fauteux JJ. was delivered by Kellock J. After discussing the enforcement of foreign judgments in the United States, and the conflicting opinions of the Courts there, he said:

"Coming to the law of Ontario, it is worth noting at the outset, the position of an alien within the King's Dominions. In *Johnstone* v. *Pedlar*[1] ((1921) 2 A.C. 262 at p. 273), Viscount Finlay said: 'The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance'.

"At p. 274: 'Prima facie the subject of a State at peace with His Majesty is, while resident in this country, entitled to the *protection accorded British subjects*'.

"Viscount Cave, p. 276: 'But so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance, *with a subject's rights and obligations*'.

"Lord Sumner, p. 291: 'As soon as it is found to be settled, as the law of our Courts, that they are open to aliens, as well as to subjects, I think it follows that they are presumably *equally* open to them, so far, that is, as actions are brought in support of such civil rights as are recognized in aliens from time to time'.

"Lord Phillimore, at p. 296: 'But alien *ami* is never exlex, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just *as an ordinary subject can.* That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien *ami*, once he is resident within the realm, is given *the same rights for the protection of his person and property as a natural born or naturalized subject.*'

"At p. 297: '*From the moment of his entry into the country* the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws with it allegiance '.

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[1] See *Annual Digest*, 1919–1922, Case No. 161.

" In *Porter* v. *Freudenberg* ((1915) 1 K.B. 857 at p. 869), Lord Reading C.J. said : ' Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts '.

" At p. 883 : ' Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.'

" There is not, therefore, one law to be applied to an alien and another to a subject. Both are entitled to the protection of the same law. Appellant, in the present case, by taking proceedings here has invoked that law, and it is the respondent who is sued. As stated by Lord Reading in the case cited, at pp. 883–4 : ' He is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal *as any other defendant*. . . .'

" It is well settled that where jurisdiction is conferred, the Court is required, rather than merely permitted, to exercise it. . . .

" That which is involved in the present case is a matter of custody. The appellant, under the guise of custody proceedings, asks for an order (she had originally requested a writ of habeas corpus) for which there is no authority outside the Extradition Act or the Deportation provisions of the Immigration Act. Even if it could be said that such authority resides in the executive, it has not been committed to the Courts : *A.-G. Dom.* v. *Cain* (1906), A.C. 542 at p. 546). In my respectful opinion, there is no jurisdiction in the Courts of Ontario or in this Court to make such an order as the appellant seeks or to do otherwise than to apply to the circumstances of this case, the ordinary law of Ontario as to custody, giving due weight, of course, to the California decree. . . ."

In the light of these principles Kellock J., and the other dissenting Judges, decided that the interests of the child would be best served by leaving him in the custody of his father, despite the judgment of the Californian Court.

[Report: (1950), 3 D.L.R. 577.]

NOTE.—While the above case is primarily concerned with a question of private international law, it has been reported here as an interesting example of the treatment by some judges of this question as one dependent upon the position of aliens as presented by international law. The decision of the Supreme Court of Canada was subsequently reversed by the Judicial Committee of the Privy Council, and the order of Wells J. in the Court of First Instance was restored: *McKee* v. *McKee* [1951] A.C. 352; [1951] 1 All E.R. 942.

Case No. 73

Aliens—Equality Before the Law—Whether Possessing a Right to Question the Constitutional Validity of Provincial Legislation—Whether in this Respect in a Position Different from that of Nationals—The Law of Canada.

WINNER *v.* S.M.T. (EASTERN) LTD. AND ATTORNEY-GENERAL OF NEW BRUNSWICK *ET AL.*

Canada, Supreme Court.

(Rinfret C.J.C.; Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright, and Fauteux JJ.)

October 22, 1951.[1]

THE FACTS.—Winner was a United States citizen. He lived at Lewiston in Maine, and operated a bus service, for the carriage of goods and passengers, under the name of Mackenzie Coach Lines. The Motor Carriage Board of New Brunswick, Canada, granted him a licence in 1949 to run public motor buses from Boston, Massachusetts, to Halifax and Glace Bay in Nova Scotia. The Board refused him permission to take on or put off passengers in the Province of New Brunswick itself.

At the time that Winner applied for the licence he challenged the validity of certain Acts of the New Brunswick Legislature, as far as they purported to affect his inter-state bus service—the Motor Carrier Act, 1937, the Motor Vehicle Act, 1934, and 13 Geo. VI. c. 47, 1949—claiming that they fell within s-s. (10) (*a*) of s. 92 of the British North America Act, which reserves certain classes of legislation for the Federal Parliament. It was under these Acts that Winner was forbidden to take up or put down passengers in New Brunswick.

The Board itself made no reply to his challenge. Despite the terms of the licence granted by the Board, Winner operated his bus services through the Province, picking up and putting down passengers there. As a result, S.M.T. (Eastern) Ltd., a New Brunswick bus company, brought an action against him. It claimed, *inter alia*, an injunction restraining him from taking on and leaving passengers in the Province, and a declaration that his action in so doing was illegal.

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[1] Although this case was decided in 1951, it has been thought desirable to report it in the present volume in view of the fact that it is concerned with an issue similar to that covered in the preceding case (*McKee* v. *McKee*).

When the action came up for trial the parties requested that the point of law as to the validity of the Motor Carriage Act and the Motor Vehicle Act be reserved for the New Brunswick Supreme Court, Appellate Division. The Court held, in a judgment of May 1, 1950 (*S.M.T.* (*Eastern*) *Ltd.* v. *Winner* (1950), 3 D.L.R. 207), that the Acts in question were within the competence of the Legislature of New Brunswick. Two of the Judges, Richards C.J. and Hughes J., dealt with the case as a purely constitutional issue, but the judgment of Harrison J., at p. 227, contains the following statement with regard to the status of aliens before the Courts of Canada: " Even if the Acts in question should be held *ultra vires* in respect of a Canadian national carrying on an undertaking local in Canada for transporting passengers and goods between Provinces, it does not follow that the defendant can raise the same defence. As a foreign national it is enough that the Province has made certain laws regarding vehicular traffic within its boundaries. These laws the defendant is bound to comply with until they are superseded by Dominion legislation. In the meantime so far as foreign nationals are concerned they have no status to ask that such laws be declared *ultra vires*." Winner appealed to the Supreme Court of Canada.

Held : that the appeal must be allowed. The requisite Acts dealt with matters reserved for the Federal Parliament by the Constitution, and were thus beyond the competence of a Provincial Legislature. Winner, even though an alien, possessed the status to challenge the constitutional validity of such Statutes in the Canadian Courts.

Once more, the Court dealt with the question largely from a constitutional point of view, but on the plea that Winner's case failed because of his alienage Kellock J. declared (at p. 565) : " In my opinion, the fact that the appellant is an alien does not affect his right to challenge the legislation in question. As stated by Lord Reading C.J. in *Porter* v. *Freudenberg* ((1915) 1 K.B. at p. 869) : ' Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen '."

On the rights of Canadian citizenship and of aliens in Canada Rand J. stated (at p. 558) : " The claim made for provincial control (of motor highways) is, in my opinion, excessive. The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of

Case No. 73 *Contd.*

the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state ; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

" The Act (B.N.A.) makes no express allocation of citizenship as the subject-matter of legislation either to the Dominion or the Provinces ; but as it lies at the foundation of the political organization, as its character is national, and by the implication of head (25), s. 91, *Naturalization and Aliens*, it is to be found within the residual powers of the Dominion : *Canada Temperance Case* (*Attorney-General for Ontario* v. *Canadian Temperance Federation*), ((1946), 2 D.L.R. 1 at p. 5 ; A.C. 193 at p. 205, 85 Can. C.C. 225 at p. 230). Whatever else might have been said prior to 1931, the Statute of Westminster, coupled with the declarations of constitutional relations of 1926 out of which it issued, creating, in substance, a sovereignty, concludes the question.

" But incidents of status must be distinguished from elements or attributes necessarily involved in status itself. British subjects have never enjoyed an equality in all civil or political privileges or immunities as is illustrated in *Cunningham* v. *Tomey Homma* ((1903) A.C. 151), in which the Judicial Committee maintained the right of British Columbia to exclude a naturalized person from the electoral franchise. On the other hand in *Bryden's* case (*Union Colliery Co. of B.C.* v. *Bryden*) ((1899) A.C. 580), a statute of the same Province that forbade the employment of Chinamen, aliens or naturalized, in underground mining operations, was found to be incompetent. As explained in *Homma's* case (p. 157), that decision is to be taken as determining ' that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province '.

" What this implies is that a Province cannot, by depriving a Canadian of the means of working, force him to leave it : it cannot divest him of his right or capacity to remain and to engage in work there : that capacity inhering as a constituent element of his citizenship status is beyond nullification by any provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that aspect of citizenship lies outside of those civil rights committed to the Province, and is analogous to the capacity of a Dominion corporation which the Province cannot sterilize.

"It follows, *a fortiori*, that a Province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the 'union' which the original Provinces sought and obtained disrupted. In a like position is a subject of a foreign friendly country; for practical purposes he enjoys all the rights of a citizen.

"Such then, is the national status embodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament."

[Report (1951), 4 D.L.R. 529.]

NOTE.—On the question of constitutional law here referred to, the Judicial Committee of the Privy Council dismissed the Attorney-General's further appeal: *Attorney-General for Ontario and Others* v. *Winner and Others*, [1954] A.C. 541; [1954] 3 All E.R. 177.

Aliens—Treatment of—Confiscation arising from Commerce with the Enemy—Whether Applicable to Nationals of Neutral States.

See Case No. 99 (*In re X. and Mrs. X.*).

III.—Expulsion of Aliens

Aliens—Expulsion of—Deportation—Discretion of Executive —Review of Exercise of Discretion by Courts—The Law of the United States of America. **Case No. 74**

DEVER *v.* VISIC.

United States, Court of Appeals of the Fifth Circuit.

March 31, 1950.

THE FACTS.—A United States federal regulation (Part 175.57, Title 8, Code of Federal Regulations) provided that the Attorney-General had authority, without hearing, to exclude an alien from entry into the United States if such entry was "deemed prejudicial to the United States". In the exercise of that authority the immigration authorities, on behalf of the Attorney-General, excluded the respondent, a Yugoslav citizen, from admission to the United States, and the Attorney-General subsequently made the order permanent and ordered the respondent's deportation. The respondent's motion for an order compelling the immigration officer concerned to terminate the deportation proceedings having been

Case No. 74 *Contd.*

granted by the District Court for the Southern District of Florida, the immigration officer now appealed. It was contended on his behalf that the authorities could not be compelled to disclose the information on which they had based their decision to order the respondent's deportation, whilst on behalf of the respondent it was contended that all the documents and records concerning him should be disclosed in order that they might be reviewed by the court.

Held : that, on the authority of *United States ex rel. Knauff* v. *Shaughnessy,*[1] the Attorney-General was entitled to order, without hearing, the exclusion of an alien, and that the order of the Court of first instance to terminate the deportation proceedings must be reversed.

[Report : 180 F. 2d 924.]

Case No. 75

Aliens—Expulsion of—Deportation—Discretion of Executive to Order or Suspend Deportation—Right of Courts to Review Exercise of Discretion—The Law of the United States of America.

UNITED STATES *ex rel.* KALOUDIS *v.* SHAUGHNESSY.

United States, Court of Appeals of the Second Circuit.

February 20, 1950.

THE FACTS.—The appellant was a Greek citizen who had originally entered the United States for a limited period of time. He had been granted several extensions of leave to remain in the United States, and finally he was informed that he would have to depart before a certain date. Having failed to do so, he was ordered to be deported. The Board of Immigration Appeals refused to suspend the order for deportation, on the ground, *inter alia,* that the appellant was a member of an organization which had been proscribed by the Attorney-General. The appellant, who was in custody pending deportation, thereupon applied for a writ of habeas corpus. The Court of first instance having refused to grant the writ, the appellant now appealed. It was contended on his behalf that he had been refused a hearing as to whether the organization of which he was alleged to be a member,[2] was in fact, notwithstanding that it had been proscribed by the Attorney-General, inimical to the interests of the United States. On behalf of the Attorney-General it was contended that this was a matter for the exercise of the Attorney-General's discretion which could not be reviewed by the courts, and that the deportation order should therefore stand.

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[1] United States Supreme Court, 338 U.S. 537 ; *Annual Digest,* 1949, Case No. 74, p. 231.

[2] The report would seem to indicate that at the time of the hearing the appellant had severed his connection with the organization.

Held : that the exercise of the Attorney-General's discretion was not subject to review in habeas corpus proceedings, and that the order dismissing the application for a writ of habeas corpus must be affirmed. The Court said :

" The Board gave, as its reason for refusing a suspension, that ' the alien was a member of an organisation appearing on the proscribed list issued by the Attorney General, the International Workers Order '. Although the record does not expressly say so, we shall dispose of the writ on the assumption that the Board refused to grant the relator any hearing as to whether the activities of the ' Order ' were in any way inimical to the interests of the United States. Further, in spite of the Board's statement that its decision was upon ' all of the evidence upon record ', we shall also assume that its action was based only upon the relator's membership in the ' Order ' ; with which he had severed his connection at the time of the hearing.

" The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it ; Congress may direct that all shall go back, or that some shall go back and some may stay ; and it may distinguish between the two by such tests as it thinks appropriate. The relator does not challenge the test here applied, so far as concerns the deportation order itself ; he agrees that, so far as his interest in residing in this country was protected by statute—in so far as it was ' a legally protected interest '—it had been forfeited. His position is that, being concededly eligible for suspension of deportation, he was entitled to the exercise of the Attorney-General's discretion, and that it appears that this has not been in fact exercised in accordance with the limitations, which must be assumed to confine it. Unless he is to be permitted a hearing to show that it has not been so exercised, he says that he will be denied ' due process of law '. It does not appear from the record that the Attorney General—through the Board, his delegate—has exercised his discretion in disregard of any implied limitations. We will assume *arguendo* that the contrary might appear : *i.e.*, that the reason given might be so clearly irrelevant that a court could say that the Attorney General had transgressed the statute. Suppose, for example, that he denied suspension because the alien had become too addicted to attending baseball games, or had bad table manners. But membership, even past membership, in an organisation which the Attorney General has ' proscribed ' may make an alien's continued residence prejudicial to the public weal. True, without an inquiry we cannot know whether membership in the ' Order ' is prejudicial ; for we cannot tell whether the Attorney General had adequate grounds for ' proscribing ' it. On the other hand we cannot say that he did not ; and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ

Case No. 75 *Contd.* should have gone. An alien has no such privilege ; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the ' exercise of discretion ', which we have again and again declared that we will not review.

" Nor has the relator any constitutional right to demand that we should. As we have said, any ' legally protected interest ' he ever had has been forfeited by ' due process of law ' ; forfeited as completely as a conviction of crime forfeits the liberty of the accused, be he citizen or alien. The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that ' due process of law ' inevitably involves an eventual resort to courts, no matter what may be the interest at stake ; not every governmental action is subject to review by judges.

" Order affirmed."

[Report : 180 F. 2d 489.]

Case No. 76 **Aliens—Expulsion of—Deportation—Procedure—Prosecuting and Judicial Functions Combined in Same Person—Whether Proceedings Irregular—The Law of the United States of America.**

WONG YANG SUNG *v.* McGRATH, ATTORNEY-GENERAL, *ET AL.*

United States, Supreme Court.

(Vinson C.J. ; Black, Reed, Frankfurter, Jackson, Burton, Minton JJ.)
February 20, 1950.

THE FACTS.—At a hearing in the course of proceedings for the deportation of an alien only a " presiding inspector " of the Immigration Service was present, and in the absence of an " examining inspector " it fell to the presiding inspector to conduct the interrogation of the alien and to present all the evidence supporting the charges incidental to the deportation proceedings. At the conclusion of the hearing the presiding inspector also prepared the summary of evidence, the proposed findings of fact and conclusions of law and the proposed order to be submitted for the consideration of the Commissioner of Immigration. It was contended on behalf of the alien that the proceedings were irregular in that they failed to meet the requirements of section 5 of the Administrative Procedure Act of 1946, which provides in substance that " ni every adjudication required by statute . . . no officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency . . . shall . . . participate or advise in the decision, recommended decision, or agency review . . ." and that this provision applied to a like extent to deportation proceedings as it did to other administrative proceedings. On behalf of the Government it was contended that the Immigration Act of 1917 did not contain any express requirements for hearings incidental to deportation, and that section 5 of the Administrative Procedure Act of 1946 was therefore inapplicable to the present case.

Held (*per Curiam*, Reed J. dissenting) : that section 5 of the Administrative Procedure Act of 1946 applied to deportation proceedings, that its requirements had been disregarded, and that the petitioner was entitled to be released. The Court said :

" This hearing, which followed the uniform practice of the Immigration Service, was before an immigrant inspector, who, for purposes of the hearing, is called the ' presiding inspector '. Except with consent of the alien, the presiding inspector may not be the one who investigated the case. 8 C.F.R. 150.6 (*b*). But the inspector's duties include investigation of like cases ; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today. An ' examining inspector ' may be designated to conduct the prosecution; 8 C.F.R. 150.6 (*n*), but none was in this case ; and, in any event, the examining inspector also has the same mixed prosecutive and hearing functions. The presiding inspector, when no examining inspector is present, is required to ' conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest '. 8 C.F.R. 150.6 (*b*). It may even become his duty to lodge an additional charge against the alien and proceed to hear his own accusation in like manner. 8 C.F.R. 150.6 (*l*). Then, as soon as practicable, he is to prepare a summary of the evidence, proposed findings of fact, conclusions of law, and a proposed order. A copy is furnished the alien or his counsel, who may file exceptions and brief, 8 C.F.R. 150.7, whereupon the whole is forwarded to the Commissioner. 8 C.F.R. 150.9.

" The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who

Case No. 76 *Contd.*

are strangers to the law and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused. Nothing in the nature of the parties or proceedings suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies. . . .

"We come, then, to examination of the text of the Act to determine whether the Government is right in its contentions: first, that the general scope of 2. 5 of the Act does not cover deportation proceedings; and, second, that even if it does, the proceedings are excluded from the requirements of the Act by virtue of s. 7. . . .

"The difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally. The Court said: 'This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.' *The Japanese Immigrant Case*, 189 U.S. 86, 101.

"We think that the limitation to hearings 'required by statute' in s. 5 of the Administrative Procedure Act [1] exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

"Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

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[1] For the wording of section 5 see The Facts *supra*.

" We hold that the Administrative Procedure Act, s. 5, does cover deportation proceedings conducted by the Immigration Service.

" The remaining question is whether the exception of s. 7 (*a*) of the Administrative Procedure Act exempts deportation hearings held before immigrant inspectors. It provides :

> ' SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> ' (*a*) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act ; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. . . .' 60 Stat. 237, 241, 5 U.S.C. s. 1006.

" The Government argues that immigrant inspectors are ' specially provided for by or designated pursuant to ' s. 16 of the Immigration Act, which, in pertinent part, reads :

> '. . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence. . . .' 39 Stat. 874, 885, as amended, 8 U.S.C. s. 152.

" Certainly nothing here specifically provides that immigrant inspectors shall conduct deportation hearings or be designated to do so. This language does direct them to conduct border inspections of aliens seeking admission. They may administer oaths and take, record, and consider evidence. But these functions are indispensable to investigations which are concededly within their competence. And these functions are likewise necessary to enable the preparation of complaints for prosecutive purposes. But that Congress by grant of these powers has specially constituted them or provided for their designation as hearing officers in deportation proceedings does not appear.

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"Section 7 (*a*) qualifies as presiding officers at hearings the agency and one or more of the members of the body comprising the agency, and it also leaves untouched any others whose responsibilities and duties as hearing officers are established by other statutory provision. But if hearings are to be had before employees whose responsibility and authority derives from a lesser source, they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process.

"We find no basis in the purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of habeas corpus and direct release of the prisoner."

[Report: 339 U.S. 33.]

Case No. 77

Aliens—Expulsion of—Procedure—Judicial Review of Expulsion Order—Grounds of Expulsion—The Law of Belgium.

BERTOLDI *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. May 19, 1950.

THE FACTS.—This was a petition for the annulment of an order for the expulsion of the petitioner made by the Minister of Justice on October 9, 1948. It was contended on behalf of the petitioner that the expulsion order did not specify the reason for the expulsion, and that it accordingly did not comply with the law of September 28, 1939, which conferred upon the Minister of Justice the power to expel aliens in certain defined circumstances only. The respondent contended that the Court had no jurisdiction, on the ground that the expulsion of an alien was an act of State.

Held: that the ministerial order of October 9, 1948, must be annulled. The expulsion order was an administrative act falling within the jurisdiction of the Conseil d'État. Aliens could be expelled only in one of the cases enumerated in the law of September 28, 1939, and the reason for the expulsion must be given on the face of the expulsion order. The Court said:

"By virtue of Article 128 of the Constitution every alien on Belgian territory enjoys the protection given to persons and property, subject to such exceptions as are laid down by law. The law of 28 September 1939 creates one of those exceptions. The ministerial order here in question is an administrative act taken by an administrative authority on the basis of that law. The petition for the annulment of that order falls under the provisions of Article 9 of the law of 23 December 1946 setting up the Conseil d'État.[1]

" The order complained of merely refers to the law of 28 September 1939. That law only confers upon the Minister of Justice the power to expel aliens within defined limits, namely, in cases in which the alien shall have entered or resided in the Kingdom without the necessary authorisation, or in cases in which his presence shall be deemed to be detrimental or dangerous to the safety or economy of the country. The respondent is bound to state which of the exceptional circumstances provided for by the law of 28 September 1939 justifies the expulsion. That statement is a formality which is indispensable for the validity of the expulsion order."

[Report : *Pasicrisie belge*, 1951, IV, pp. 4–5.]

Aliens—Expulsion of—Procedure—Expulsion Order—Statement of Circumstances Justifying Expulsion—The Law of Belgium. **Case No. 78**

BANDALI *v.* GOVERNOR-GENERAL OF THE BELGIAN CONGO.

Belgium, Conseil d'État. November 17, 1950.

THE FACTS.—This was a petition for the annulment of an order for the expulsion of the petitioner made by the Governor-General of the Belgian Congo on June 10, 1948. The expulsion order stated that the petitioner was a danger or might be a danger to public order and tranquillity. It was contended on behalf of the petitioner that the circumstances justifying expulsion were not sufficiently stated in that formula.

Held : that the order made by the Governor-General on June 10, 1948, must be annulled. The Court said :

" The order of the Governor-General was made in pursuance of a legislative ordinance of 8 March 1922, which was approved by a decree of 8 August 1922. Article 14 of that ordinance provides that the Governor-General may by an order containing the reasons for his action compel ' any non-native who resided in the territory before the coming into force of the present ordinance . . . (*a*) whose presence or conduct is a danger or threatens to be a danger to public order and

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[1] That Article provides: " The administrative division (of the Conseil d'État) shall give decisions on petitions for the annulment of acts or regulations of the various administrative authorities, or of contentious administrative decisions, on the ground of their non-compliance with formalities which are essential or are prescribed or on the ground of excess or abuse of powers ".

Case No. 78 Contd. tranquillity' to leave the colony. The duty to state the reason for the expulsion was affirmed in Article 16 of a Decree of 27 December 1944.

"The order here complained of only cites the actual text of the law. It does not even state which of the legal conditions justify the expulsion. That lack of precision amounts to failure to state the reasons for the expulsion. The statement of the reasons for the expulsion in the order addressed to the person concerned is the only guarantee given to the latter. No notice is given of the consideration of the case which would enable the person concerned to take steps in her defence. Without a statement of the reasons for the expulsion she would be at the mercy of an arbitrary decision. Such a statement is moreover required by Article 14 of the ordinance of 8 March 1922. It is thus a formality which is essential for the validity of the expulsion order."

[Report: *Pasicrisie belge*, 1951, IV, pp. 84–5.]

Case No. 79

Aliens—Expulsion of—Detention Pending Removal from the Country—Deportation to State of Origin—The Law of South Africa.

ARONOWICZ *v.* MINISTER OF THE INTERIOR.

South Africa, Appellate Division of the Supreme Court.
(Watermeyer C.J.; Centlivres, van den Heever JJ.A.)
November 15, *December* 12, 1949.

THE FACTS.—Aronowicz was an alien of Polish nationality who entered South Africa in 1938 on a temporary permit. Later he applied twice for permission to reside permanently in the Union, in accordance with Sec. 4 of the Aliens Act, 1 of 1937. The second application was granted in 1941; but in 1948 the Minister of the Interior cancelled the permit, and Aronowicz was ordered to leave South Africa before January 18, 1949. He failed to do so, and was twice prosecuted for contraventions of the Aliens Act (Sec. 8 (4)). He was finally taken into custody pending deportation.

Aronowicz applied to the Courts. He claimed that the Minister had taken no steps to have him removed from the country, and that he was only held under arrest as a means of compelling him to leave the Union voluntarily. Murray J. issued a rule *nisi* calling upon the Minister to show cause why Aronowicz should not be released and not be immune from further arrest or detention. Upon the return day Maritz J.P. discharged the rule. Aronowicz appealed against the decision.

Held: that the cancellation of the permit of residence could not be impugned, nor the action of the Minister in declaring Aronowicz a prohibited immigrant under the Aliens Act. Counsel for the appellant argued that Sec. 21 of Act 22 of 1913, under which Aronowicz was detained as a prohibited immigrant, curtailed the liberty of the subject, and so was to be construed in the manner most favourable to the person imprisoned. (*Principal Immigration Officer* v. *Bhula* (1931), Appellate Division, 323, at p. 336.) The relevant section of the Act reads: " any person . . . who . . . being the subject of an order issued under any law to leave the Union . . . has failed to comply with the terms of . . . such order . . . may . . . be arrested without warrant and removed by warrant from the Union, and pending removal, may be detained in such custody as may be prescribed by regulation ".

It was argued that " pending removal " only covered such time as was necessary to make transport arrangements to the country willing to receive the deportee. Van den Heever J.A. stated that he could not accept this construction: " There is nothing in the section to suggest that no arrest can be made until some foreign country has agreed to receive the deportee. In principle I can see no difference between difficulties arising out of lack of transport facilities and difficulties relating to his reception by some foreign country."

The Judge went on to consider whether Aronowicz had been detained for an unreasonably long time. He pointed out that not all States were now willing to receive back their nationals when another State wished to repatriate them, and he referred to *R.* v. *Governor of Brixton Prison : Ex parte Lannoy* [1] ([1942]) 2 K.B. 281). As a result, negotiations on the reception of a deportee tended to be prolonged, and Aronowicz's seven weeks in custody could not be considered excessive. There was no evidence that the Minister had acted in bad faith, and therefore he had not exceeded his powers.

[Report: (1950), 1 S.A.L.R. 568.]

Aliens—Expulsion of—Deportation on the Basis of Confidential Information—Safeguards Against Arbitrary Exclusion of Immigrants—Natural Justice—The Law of South Africa. **Case No. 80**

In re MOHAMED.

South Africa, Cape Provincial Division
of the Supreme Court.
(Fagan A.J.P., van Zyl J.)
June 5, 1950.

THE FACTS.—Mohamed, an alien of Indian origin, was involved in deportation proceedings before the South African Immigration Appeal Board. At his instance the question of the legal definition of 'natural justice' was reserved for

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[1] See *Annual Digest*, 1941–1942, Case No. 86.

Case No. 80 *Contd.* decision by the Court. He alleged that the hearings before the Board were not in accordance with natural justice. The Principal Immigration Officer had produced certain documents before the Board, bearing on the veracity of Mohamed's own evidence, which neither he nor his counsel was able to examine.

Held (*per* Fagan A.J.P.) : that the proceedings before the Board had not been in accordance with natural justice. The Court considered itself bound to decide one question alone. Had the proceedings been in accordance with natural justice ? Even though it found that this was not so it was beyond the present jurisdiction of the Court to decide what remedies the appellant might have. For a definition of natural justice the Judge referred to *Marlin* v. *Durban Turf Club and Others* ((1942), Appellate Division 112 at p. 126), and he quoted Tindall J.A., who, in that case, referring to an English decision, declared : " The learned Lord Chief Justice applied the test whether the Board had acted in good faith, had fairly listened to both sides, and had given a fair opportunity to those who were parties to the controversy for correcting or contradicting any relevant statements prejudicial to their view ". On applying this test the judge considered that Mohamed's defence had been unfairly prejudiced ; though he avoided laying down any hard and fast rule which might compel the Board to place all documents before the appellant in such cases. He declared that " at least sufficient information must be put before him (the appellant) to enable him ' to correct or contradict any relevant statements prejudicial to his view ' ".

[Report : (1950), 3 S.A.L.R. 698.]

D—EXTRADITION

III.—Conditions of Extradition. Extraditable Crimes

Case No. 81 **Extradition—Conditions of—Offence Committed Outside the Territory of State Claiming Jurisdiction—Whether Accused a Fugitive Offender—Pertinence of Extradition Treaty—Treaty between the United States of America and Germany.**

GILLARS *v.* UNITED STATES.

United States, Court of Appeals of the District of Columbia Circuit. May 19, 1950.

THE FACTS.—The appellant was a United States citizen, and between 1941 and 1945, while the United States was at war with Germany, she recorded certain broadcasts in the latter country. Her recordings were broadcast from Germany to the

United States, their purpose being to weaken the United States war effort. When the United States forces entered Germany the appellant was arrested and taken to the United States, where she was subsequently convicted of treason. She now appealed against her conviction, *inter alia*, on the following grounds: (i) that her forcible transfer from Germany to the United States constituted a violation of the Extradition Treaty between the two countries of July 12, 1930, which provided only for the surrender of persons charged with crimes other than treason; and (ii) that the criminal law of the United States had no extra-territorial scope so as to include the trial of an accused for treason committed outside United States territory. The United States Government, the respondent herein, contended that, regardless of the nature of the offence charged, the Extradition Treaty relied upon by the appellant only applied to fugitive offenders who have fled the country in which the offence has been committed, and as the offence had been committed in Germany, the Treaty did not apply so as to preclude her forcible transfer to the United States. As to the other contention put forward by the appellant, the United States Government relied upon the wording of the Treason Statute of the United States which defined treason as the giving to the enemy of " aid and comfort within the United States and elsewhere ", and that accordingly the offence included treasonable activities carried out in Germany.

Held : (i) that the Extradition Treaty between the United States and Germany was inapplicable, and that the appellant was therefore not entitled to object to her forcible transfer to the United States;

(ii) that the courts of the United States were entitled to try United States citizens for treason committed against the United States outside the territory of the United States, and that the appellant's conviction must accordingly be affirmed. The Court said :

" The argument that appellant was entitled to asylum in Germany rests no doubt, though not explicitly so stated, upon the Extradition Treaty between the United States and Germany of July 12, 1930, 47 Stat. 1862, 1867. It provides in Article I for the surrender on requisition by either of the signatory powers of a person charged with or convicted of certain crimes, not including treason, committed within the territorial jurisdiction of one of the signatories and found within the territory of the other. As to the pertinence of this treaty to the contention made, we can do no better than adopt the disposition of a like question in *Chandler* v. *United States*, . . . 171 F. 2d at page 935, where it is pointed out that the treaty applies only to fugitives who have fled the country where the crime was committed." The Court (Magruder Ch.J.) also said :

" In the absence of treaty a State may, without violating

Case No. 81 Contd.

any recognized international obligation, decline to surrender to a demanding State a fugitive offender against the laws of the latter. *United States* v. *Rauscher*, 1886, 119 U.S. 407, 411, 412, 7 S.Ct. 234, 30 L.Ed. 425. Particularly as regards fugitive political offenders—including, presumably, persons charged with treason : *Ex parte Commonwealth of Kentucky* v. *Dennison*, 1868, 24 How. 66, 16 L.Ed. 717—it has long been the general practice of States to give asylum. But the right is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it. . . ." (171 F. 2d at page 935.)

. . . . . .

" Appellant urges that the crime of treason under the law of the United States does not have extra-territorial scope. It is said that this follows from the general presumption against giving extra-territorial application to criminal statutes, and also because, it is said, treason is not committed by a citizen who resides in enemy country and therefore must engage in some trafficking with the enemy. As to the first branch of the argument, the Supreme Court has decided that the Constitution does not forbid the application of the criminal laws of the United States to acts committed by its citizens abroad. It is a question in each case of the intent of the lawmakers.

" ' While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.' *Blackmer* v. *United States*, 1931, 284 U.S. 421, 437, 52 S.Ct. 252, 254, 76 L.Ed. 375.

" See, also, *United States* v. *Bowman*, 1922, 260 U.S. 94, 102, 43 S.Ct. 39, 67 L.Ed. 149 ; *American Banana Co.* v. *United Fruit Co.*, 1908, 213 U.S. 347, 357, 29 S.Ct. 511, 53 L.Ed. 826, 16 Ann. Cas. 1047 ; *Skiriotes* v. *Florida*, 1940, 313 U.S. 69, 73, 61 S.Ct. 924, 85 L.Ed. 1193.

" The treason statute, enacted by the first Congress in 1790, *supra*, condemns the giving to the enemy of ' aid and comfort within the United States or elsewhere '. This rebuts any presumption against extra-territorial application of our treason law which might have existed under the general rule. By the statute itself the overt act may be committed outside the United States. Adherence to the enemy and the treasonable intent, when they exist, attach to the act and to its perpetrator wherever he is. These factors too, therefore, may be outside the United States, and so, accordingly, may the whole of the crime. Aside from the intention of Congress expressed in the statute we are of opinion that the usual presumption against extra-territorial application of the criminal law does not apply to treason. The purpose of a criminal statute ordinarily is to protect the domestic order, not to reach across national boundaries to take hold of persons within the jurisdiction of another nation. But treason is directed against the existence of the nation and by its nature consists of conduct which might ordinarily be exerted from without in aid of the enemy which is, usually, without. The act of adhering to the enemy, giving it aid and comfort, not unnaturally attaches to the enemy wherever it is. While the Constitution is silent on the question the statutory definition which quickly followed the Constitution was the handiwork of many of those who framed the greater instrument. The use in the statute therefore of the words, 'within the United States or elsewhere', is strongly indicative of the territorial range of the constitutional provision. While treason shall consist only of that which is made so by the Constitution; while its nature is limited, *Cramer* v. *United States* . . ., the reasons which led the founders to circumscribe the conduct which would constitute the crime do not restrict its territorial reach. See discussions in the recent *Chandler* case, in both the District Court (D. Mass. 1947, 72 F. Supp. 230) and in the Circuit Court of Appeals (*supra*). See, also, the reasoning of the Court in *United States* v. *Bowman, supra,* and *United States* v. *Stephan*, D.C.E.D. Mich. 1943, 50 F. Supp. 738, 741; 6 Cir., 1943, 133 F. 2d 87, 99, *certiorari* denied 1943, 318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1148. . . . . . .

"We find no reversible error and the judgment accordingly is affirmed."

[Report: 182 F. 2d 962.]

Extradition—Conditions of—Reciprocity—Assurance of Reciprocity in the Request for Extradition—Absence of Designation of Penalty in the Request for Extradition—Bustamante Code—Effect of—Relevance of Absence of Formal Binding Force. **Case No. 82**

Re VIGONI.

Chile, Supreme Court. September 7, 1950.

THE FACTS.—The Argentine authorities sought the extradition of Humberto Vigoni, an Italian national, on charges of smuggling. The documents submitted with the extradition request included a warrant for the arrest of the fugitive and, in the absence of a perfected extradition treaty between Argentina and Chile, an offer of reciprocity in like cases. The Fiscal recommended that the Supreme Court approve the extradition request.

Held: that the extradition request must be denied. Extradition will not be granted, in the absence of reciprocity, where

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no extradition treaty is in force between the States. The Court said:

"It has been established that no treaty having the force of law exists with the Argentine Republic for the extradition of fugitives, as the conventions signed by both states in Havana on February 13, 1928 [the Code of Private International Law or Bustamante Code], and in Montevideo on December 26, 1933 [the Convention on Extradition], have not been ratified by Argentina. In the absence of perfected treaties, Article 647 of the Code of Penal Procedure provides that extradition must be governed by principles of international law. Reciprocity in international relations is unanimously regarded as one of these principles. While there was formerly a fixed international principle that extradition would only be granted for offences of notorious gravity, condemnable by universal conscience, the growing interdependence of nations and stricter ties in international relations today impose a duty to cooperate freely in bringing about the punishment of crime in order to advance law and justice everywhere. The Bustamante Code, which governs relations among those American states which have ratified it, authorizes extradition for any offence which carries a penalty of not less than one year's deprivation of liberty. . . . On the basis of the documents accompanying or inserted in the extradition request, it does not appear that the court of the demanding State has made a provisional or definitive determination of the penalty assigned to the delict imputed to Vigoni, still less that this penalty is more than one year's imprisonment, an omission which in itself constitutes grounds for the denial of extradition in accordance with the provisions of Article 354 of the Code of Private International Law [Bustamante Code]. Although the Code does not have the force of law for Argentina, nevertheless it constitutes a real and definitive principle of international law, accepted alike by Chile and Argentina.[1] Moreover, the Argentine Government has not offered that reciprocity in analogous cases, without which, in the absence of treaties, it is generally agreed that extradition may not be granted. The above finding is not affected adversely by the fact that the Argentine court may have offered such reciprocity in its letters rogatory, for as is well known, only the Head of the State may undertake commitments *vis-à-vis* other States. Matters of extradition are precisely the kind of question which must be determined by the interested Governments, whatever may be the part played in the matter by the courts in accordance with the laws of each country."

[Report: *Gaceta de los Tribunales*, Año 1950, pt. 2, p. 411.]

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[1] In a note of September 22, 1950, the above decision was approved, with the elimination of paragraph 11: *Gaceta de los Tribunales*, Año 1950, pt. 2, p. 415.

Note.—It is of interest to note the way in which the Court dealt with the various pleas of the accused: " The accused in the answer to the report of the Fiscal presents the following objections to the extradition proceeding: that his identity has not been established; that the charge of smuggling has not been proved; that whatever the gravity of the delict, extradition may not be granted in conformity with principles of international law as the Bustamante Code is not applicable to Argentina; that it has not been proved that smuggling is a crime in Argentina nor that Mr. Vigoni has actually been involved in the crime imputed to him; that the extradition request does not conform to any of the requirements of Article 365 of the Bustamante Code; that there is no question about the identity of the accused in view of his own admission that he arrived in Argentina from Italy and was seized in that country on charges of smuggling; that although the extradition request has not been accompanied by a personal description of Vigoni nor by proofs or details which might serve to identify him, these points do not in themselves justify a denial of extradition in view of the establishment of identity mentioned in the preceding paragraph; that authentic proof of the issuance of a warrant for the arrest of Vigoni has been submitted; and that in the extradition request there are reproduced the provisions of Article 64 of Argentine Law No. 11,281, which fix a penalty of imprisonment from one month to three years for smuggling. With regard to the delict charged against Vigoni, while proof of his participation has not been submitted, the extradition request as well as the above statement of Vigoni constitute sufficient evidence to establish it for the purpose of the present proceeding which is not concerned with the trial of the charges."

Extradition—Conditions of—Absence of Extradition Treaty—Bustamante Code—The Law of Venezuela.

Case No. 83

In re Vargas Chacón.

Venezuela, Supreme Court. August 10, 1950.

The Facts.—This was a petition by the Criminal Court of First Instance, pursuant to the provisions of the Code of Criminal Procedure, for a decision by the Supreme Court on the question whether or not a request should be made to the Mexican authorities for the extradition of Félix Vargas Chacón, a Venezuelan citizen detained in the City of Mexico. Vargas had been indicted and an order for his detention had been issued in Venezuela on the charge of criminal fraud in violation of Article 464 of the Penal Code.

Held: that a request for the extradition of the accused should be made to the Government of the Republic of Mexico. The Court found that the indictment and order of detention conformed to the requirements of Venezuelan law; that

Case No. 83 Contd. criminal fraud was an extraditable offence under the norms of international law; and that the request for extradition will properly be made, even though there was no special treaty on the subject between Mexico and Venezuela, on the basis of reciprocity as well as under Article 344 of the [Bustamante] Code of Private International Law (enacted by the Havana Convention on International Law of February 13, 1928, to which both countries were parties), providing for the delivery of persons convicted or indicted for common crimes.

[Report: I, *Gaceta Forense*, No. 5 (August 1951), at p. 115.]

Case No. 84 **Extradition—Conditions of—Extraditable Offences—Criminal Nature of the Act according to the Law of the Requested State—The Law of Venezuela.**

In re JANSSENS.

Venezuela, Supreme Court. May 8, 1950.

THE FACTS.—The Belgian Government requested the extradition of Frederick Joseph Jean Albert Janssens, a Belgian subject convicted in the City of Brussels of the crime of abuse of confidence and currently detained in the city of Caracas, Venezuela. The conviction, which carried a sentence of two years' imprisonment and other accessory penalties, was for tax evasion and " for having fraudulently converted, or dissipated, to the detriment of Marcelè Paquot, a widow, the sum of 330,000 francs which she had delivered to him on condition that it should be returned, or invested as directed by her ". The request was based upon Article 2, paragraph 9, of the Extradition Treaty entered into between Venezuela and Belgium on March 13, 1884, which lists " abuse of confidence " as an extraditable offence.

The defence was that the conviction was improper, since the alleged abuse of confidence was a civil matter which had been settled on the basis of a gradual payment of the debt contracted. The Court itself raised the issue whether extradition could properly be granted, since " abuse of confidence " was not specifically classified as a crime in the Penal Code of Venezuela.

Held : that extradition should be authorized. The Court said :

" Paragraph 6 of Article 20 of the Venezuelan Penal Code adopts the principle of identity of the norm as a basis for the granting of extradition. While ' abuse of confidence ' is not classified as a crime among us, the factual situation which characterizes this crime is classified in our law under the label ' misappropriation '. Therefore, it must be concluded that it refers to the same criminal offence; and this explains the fact that 'abuse of confidence' has been included as a ground for extradition in several treaties entered into by the Republic of Venezuela."

The Court also found that the formal requirements had been complied with, and stated: "It is settled law in this Court that the issues raised by the interested party on the merits are beyond its powers to decide, since final judgment on these matters should properly be rendered by the courts of the demanding country".

[Report: I, *Gaceta Forense*, No. 5 (August 1951), at p. 15.]

Extradition—Conditions of—Right of the Requested Government to Examine Evidence of Guilt of the Accused—Bolivarian Agreement on Extradition of 1911—The Law of Venezuela. **Case No. 85**

In re BOADA TAVERA.

Venezuela, Federal and Cassation Court.
Opinion by Dr. Héctor Parra Márquez. July 24, 1950.

THE FACTS.—This was a request, by the Republic of Peru, for extradition of Carlos Boada Tavera, a Peruvian citizen, for alleged homicide committed in Lima, Peru, on the person of Francisco Graña Garland. The accused objected to the extradition on the following grounds, as stated by the Court:

"(*a*) That pursuant to the Havana Convention, signed by Venezuela, and in accordance with the Treaty on Extradition between our Republic and the Republic of Peru, the application for extradition must be made through diplomatic channels; that the formal document of transmittal from the Ministry of the Interior was accompanied only by a certification issued by Alfredo Flores Patiño, Clerk of the State, which contains copies of the indictment issued against Raul Haya de la Torre and Carlos Boada Tavera for the crime of homicide committed upon Francisco Graña Garland; that therein is transcribed the order by which the Magistrate's Court directed that a certified copy of the proceedings be sent to the Supreme Court so that it might decide whether a demand for the extradition of Boada Tavera could properly be made; that, therefore, certain documents are missing which must have been part of the criminal proceedings from the time when that copy reached the [Peruvian] Supreme Court until the time when the [Venezuelan] Ministry of the Interior received it from the Chancellery, following the appropriate diplomatic procedure which must be observed, however slow and formalistic it may appear, since so long as that Treaty is in force any other procedure is irregular; that treaties usually enumerate the contents of the record in extradition proceedings, among which is included the application for

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extradition itself; that the first omission which is disclosed upon examination of the record is that of the appropriate application for extradition; that this omission would in itself be decisive, in his opinion, to stay the course of the present proceedings, for it is useless to speak of extradition unless there is at least a formal demand from the interested country.

"(*b*) The accused, Boada Tavera, through his counsel, alleges also that, for extradition to be carried out under Article 1 of the Bolivarian Agreement, it is necessary that the evidence of the violation be such that the law of the place where the fugitive or defendant is found would justify his detention or trial if the commission or attempt or frustration of the crime or offense had occurred in such a place; that Article 8 of the same Bolivarian Agreement in specifying the elements which must accompany the record of extradition proceedings requires 'the depositions or other evidence supporting the issuance of the order, in case the fugitive has been merely indicted'; that there is no doubt that, in agreeing upon such rules to govern their mutual relations with respect to extradition, the contracting States reserved the right to verify by their own organs the evidence on which the criminal prosecution of every individual who finds himself within their territory is based, and that the case is reduced to the determination of whether the documents accompanying the extradition record sustain the proof required by the law. Then follow an enumeration and a detailed analysis of all the documents, leading to the conclusion that the evidence fails to prove the *corpus delicti*, so that, had the crime been committed in Venezuela, the judges would be compelled to consider the case closed; but the accused states that he is not interested in denying the existence of the facts of the crime, but only in demonstrating to the Court that the prosecution of which he is the object lacks any foundation, and for that purpose he undertakes to examine the depositions contained in the record, and concludes, after a detailed analysis of such declarations, that the evidentiary material submitted by the Peruvian authorities contains no proof or indication of his guilt in the commission of the crime to which the present proceedings refer; that upon such proof of his innocence he petitions that the case be declared closed and, consequently, that extradition be denied on the ground that the evidence submitted would be insufficient to warrant the issuance of an order of detention if the crime had been committed in Venezuela."

The relevant facts relating to the substance of the charge against Boada Tavera are stated under (4) of the *Held* below.

Held : that the request for extradition must be refused. In the first instance, the request for extradition did not contain an exact designation of the offence with which the accused was charged. Secondly, the evidence produced before the

Court did not substantiate the charge levied against the accused. The Court said:

"1. In the note dated 2 March last, sent to the Chancellery of Venezuela by the Ambassador of Peru at Caracas, a copy of which, as mentioned above, was forwarded to this Court through the Ministry of the Interior, the said official on behalf of his government applies to the Government of Venezuela for the extradition of Carlos Boada Tavera, a Peruvian citizen, in full compliance with the Treaty on Extradition entered into at Caracas in 1911 between Venezuela and Peru and other countries, and in accordance also with the stipulations on the subject contained in the Code of Private International Law signed at Havana in 1928 by Venezuela and Peru. Consequently, it is evident that the said application for extradition has been made through the proper diplomatic channels, pursuant to the provisions of Article 6 of the said Treaty on Extradition of the year 1911.

"2. As to the allegations of Mr. Boada Tavera to the effect that the evidentiary material sent to this Court by the Peruvian authorities contains no proof or indication whatsoever regarding his guilt in the commission of the crime to which the said proceedings refer, the Chamber observes:

"Two principal systems prevail with respect to the question of how the authorities of the requested country should proceed in granting extradition. Under one of these systems, the authorities of the requested country confine themselves to an examination of the regularity of the application without, of course, going into a consideration of the question of the guilt or innocence of the subject of extradition. Full faith is thus given to the word of the demanding State without violation of the rules regarding jurisdiction, and without becoming involved in questions of foreign justice. This system prevails in France, Belgium and some other countries. Under the other system, the requested country undertakes the examination of such questions, and decides the guilt or innocence of the person involved. While this system is praised, on the ground that, indubitably, it provides efficacious guarantees as far as individual liberties are concerned, it is severely attacked on the ground that it is subject to serious objection in attributing to the courts of the requested State a competence which encroaches upon the jurisdiction of foreign countries. In England, where these principles prevail, the accused person is brought before the judicial authorities who, at a public hearing, examine the case by way of contentious procedure. The judge renders judgment and goes into an analysis of the merits of the case on the issue of the guilt or innocence of the subject of the application for extradition. That judgment can be appealed from to the proper court. Furthermore, even if the judgment is in favor of extradition, the Executive is not bound to carry out the delivery. In the United States of America extradition is not generally granted except by virtue of a Treaty. But there the general principle is that the application for extradition must be accompanied by documents which establish the nature of the crime and the existence of sufficient proof to create a presumption, at least, of the guilt of the accused who, in the exercise of his right to defend himself, may examine witnesses and may have recourse to the writ of habeas corpus. The evaluation of the evidence is within the province of the judge, and unless the court finds against the accused the Executive cannot order his extradition.

"On the one hand, those who oppose this system insist that it is logical to fix the duties and rights of each State within proper limits, so that the judgment of one as to the guilt or innocence of the accused will not be substituted absolutely for the judgment of another, and encroachment will be thereby avoided upon the administration of justice of each. On the other hand, the advocates of this system, without denying that argument, allege that there is a definite reason why, as a general principle established everywhere, there is an obligation that the application for extradition be accompanied by either all the antecedents demonstrating the guilt and the participation of the accused, or by the final judgment convicting him.

"In Venezuela the subject of extradition is governed by the provisions contained in the Penal Code and the Code of Criminal Procedure, and according to Article 393 of the latter, it is within the province of this Federal and Cassation Court to decide whether or not the extradition is to be granted, observing for this purpose the provisions of Public Treaties or, in default thereof, those principles of International Law which are not in conflict with the rules established by Article 391 *ejusdem.*

"Consequently, in accordance with these principles, if Venezuela stipulates in a Treaty that, in the granting or denial of extradition, consideration should be given to factors relating to the guilt or innocence of the accused, this stipulation must be complied with, since it is not contrary to the said Article 391 of the Code of Criminal Procedure, nor to any other statutory provision.

"3. It is necessary, therefore, to analyse the Treaty on Extradition cited above, entered into by Venezuela and Peru and other countries in 1911, to ascertain whether it contains some relevant provision. Article 1 of said Treaty provides literally: 'In order that extradition may be effected it is necessary that proof of the violation be such that the laws of the place where the fugitive or defendant is found would justify his detention or trial if the commission, or attempt or frustration of the crime or offense had taken place there'.

" In view of the clear and precise terms of this article there is no doubt that in the specific case of Carlos Boada Tavera this Court must enter into an analysis of the evidence contained in the record, in order to determine whether the evidence is of such a nature that it would justify among us his detention or trial if the infraction had taken place in Venezuelan territory.

" 4. In the light of these principles, it is necessary . . . in compliance with the terms of Article 1 of the Treaty on Extradition entered into between Venezuela and Peru, previously quoted, to determine whether the order of detention issued against Tavera in Peru would be justified in our country; in other words: Whether, pursuant to the provisions of Article 182 of our Code of Criminal Procedure, which establishes the basic requirements which must be met in issuing an order of detention against any person, and which is the article applicable to the present case under the provisions of such Treaty, it would be possible to order the detention of the said Boada Tavera in Venezuela.

" Article 182 requires that there be *proof* that an act warranting physical punishment has been committed, and well-founded indications of the guilt of the person against whom the order of detention is issued. We proceed, then, to examine the evidence accompanying the application for extradition. This evidence is:

" (*a*) A certification of the deposition given by Boada Tavera himself on 13 June 1947, in an investigation instituted against another citizen whose surname is Tello, and who in order to establish an alibi used Boada's testimony. In his deposition the latter stated that he was an employee of the Ministry of Agriculture of Peru; that he used a 'Chevrolet' automobile; that on 7 January 1947 Tello went to his office between 12:30 and 1:00 p.m. to ask him for an appointment to sign some drawings; that he made an appointment with Tello for 6 p.m. in his office in the Ministry; that Tello left at once, all of which was witnessed by Carlos García Ronseros; that in the afternoon Boada himself left his office about 3:30 or 4 and went to the Association of Mining Engineers, returning to his office about 5 p.m.; that he left again at once and went to the University to look over some examination papers, as he was a professor there; that at 6 p.m. he returned to the Ministry; that García Ronseros told him that Tello had called on the telephone requesting him to wait half an hour longer; that Tello arrived at 6:30 and told him that he would be right back, as he was going to pick up a drawing; that Tello did so, returning about 7 p.m. with a gentleman who, he said, was his brother; that after he, Boada, signed the drawing he remained talking with Tello, who was a good friend of his, and García Ronseros also took part in the conversation; that all this might have taken about half an hour, after which Tello and his brother left. Upon being questioned by the judge as to whether he had driven his automobile to the 'Perú' garage, facing the 'Sanitas' establishment, and had got out of the car at approximately 3:30 p.m., after watching the garage, Boada Tavera answered that this was not so. Being questioned as to how he could explain the fact that Baldomero Espinoza Montes had previously told the police that upon seeing Boada he found a great resemblance, and the same characteristics, between him and 'the person who got out of the car on the afternoon of the 7th of January in front of the "Perú" garage', Boada answered that this man was lying.

"(*b*) There is a certification of the deposition of Mr. Carlos García Ronseros which agrees in full with Boada's. Among other things, answering questions put to him, he said that Boada was in the habit of wearing clothing made of light fabrics, although he could not remember the colour of the suit he was wearing on the 7th of January, and that the automobile which the said Boada used was a light gray 'Chevrolet'.

"(*c*) In his deposition Baldomero Espinoza says, in brief, that the automobile which he saw arrive in front of the 'Perú' garage on the 7th of January, at approximately 3:30, was dark blue, with four doors which opened from front to rear, particularly the driver's door, and with black wheels; that it was not a new car, but an old model, although he cannot specify the make or the year. He noticed the characteristics of the individual he saw step out of the car that day. He said that he had established the resemblance between that individual and the accused engineer, Boada Tavera, because when he was in the Intendencia, sitting beside some other individuals, Mr. Marin called him and told him to look at the people who were there, without their noticing, and to see whether any one resembled the person who got out of the car, and to pay particular attention to the one who was sitting and smoking; that the deponent went out to where the other individuals were, and looked surreptitiously at the person who had been pointed out to him, and found that he really did look like the person who had stepped out of the car, that his features were similar, and that the deponent told Mr. Marin that there was a resemblance, to which Mr. Marin said: 'the person you have just seen is the engineer Boada of the Ministry of Agriculture'. He also stated that he had been shown different automobiles and that none of them was the one he saw on the 7th of January. When a photograph was placed before him so that he might say whether that was the individual whom he had seen sitting in the Intendencia, he stated that, because such a long time had elapsed since then, he could not determine this with certainty, but that it looked very much like him, and also like the man whom he saw get out of the car on the 7th of January in front of the garage 'Perú'.

"Pursuant to the cited article 182 of our Code of Criminal Procedure, as previously mentioned, two circumstances are required in order that detention may be ordered: 1.—that the summary investigation produce proof that an act warranting physical punishment has been committed, and 2.—that there appear from the same investigation *well-based indications of the guilt* of the person against whom the order is to issue. According to this provision, therefore, the indications must be *well-founded*, that is to say they must be based on a positive fact having a direct relation to the suspected person. When in the inquiry conducted by the Examining Magistrate the criminal act is not proved, or there are no well-founded indications of the guilt of the suspect, the Examining Magistrate must refrain from ordering the detention of the said suspect.

"Having made a careful analysis of the various evidentiary elements referred to above, the Chamber finds:

"1. That the order of detention issued by the Fourth Magistrates' Court of the city of Lima, dated 13 January 1950, which appears among the documents accompanying the application for extradition, and which has been inserted in the body of this opinion, does not contain the exact designation of the offence or crime, conditions which are required by Article VIII of the Treaty on Extradition entered into between Venezuela and Peru in the year 1911.

"2. That neither in the text of that part of the judgment which was inserted in pages 2, reverse side, and 3 of the documents accompanying the application for extradition, nor in the depositions of the various witnesses, to which reference has been made, and which are the only evidence appearing on the record, does the Chamber find any well-founded indication of the guilt of citizen Carlos Boada Tavera; and that, consequently, if the offence for which the extradition is requested had been committed in Venezuela, it would not be possible, on the basis of such evidence, to order the detention of the said Boada Tavera.

"In fact, the text of that part of the judgment to which reference has been made states only that Boada Tavera 'whose testimony is the most important proof of Tello's alibi, is identified, because of his physiognomical characteristics, as the person who resembles the man who went to inquire about the time when the employees of "Sanitas" would finish work, as well as the person who, on the 7th of January, at 3:30 p.m., according to the deposition of Baldomero Espinoza, watchman at the "Perú" garage located in front of the Institute "Sanitas", stepped out of a private automobile, and approaching the garage looked towards the back as if to find out whether it

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opened into the Avenida Brasil through which the assassin could escape '.

" Undoubtedly these references, in isolated form as they appear in the record, cannot constitute well-founded indications of any guilt, since what is being imputed to Boada Tavera is only that he resembles a citizen who went and inquired at a certain place about the time when certain employees would leave, and that he likewise resembles a person who stepped out of an automobile in front of a garage, and approaching the door looked towards the rear of the garage, facts which by themselves are not criminal in nature, nor can they separately constitute indications of guilt.

" Neither does the Chamber find that such indications can be inferred from the excerpt of the deposition made by Boada Tavera himself and to which reference has been made in the text of this decision, nor from the deposition of Mr. García Ronseros which, as previously stated, agrees with Boada's deposition.

" As to the deposition of Mr. Baldomero Espinoza, this only shows that on the 7th of January at 3 o'clock in the afternoon the witness saw a four-door light or dark blue automobile with black wheels and other characteristics, arriving in front of the ' Perú ' garage ; that a ' short man, clean shaven, of rather fair complexion, medium build, with a moustache, wearing a black jacket ', stepped out from this car ; that he began to look attentively at the gates from the sidewalk ; that he passed a handkerchief over his face ; that he thus remained for a few minutes and then left. Apart from the fact that in the questioning to which the witness was subjected, with regard to the individual who was pointed out to him, and who was Mr. Boada, he said only that ' he really looked like the person who stepped out of the car ; that his features were similar ' ; and apart from the fact that the resemblance of Boada Tavera to an individual whom he saw for brief moments stepping out of an automobile and then returning to the vehicle, was discovered by the witness several months after the occurrence of the event, it is clear in the opinion of this Chamber that, even assuming that the person who stepped out of the automobile was the said Mr. Boada, neither such fact nor his presence at the place and time specified by the witness, permit a justifiable inference that Boada took part in the perpetration of the crime.

" That one person resembles another who was seen in a certain place is merely an indication, and a weak one, to be sure, that they may be the same person. One may not impute a certain criminal act to the person who really was there in order to deduce from it, on evidence of *resemblance*, that this person was the author of the act.

" What is imputed to that person is that he *arrived* there and *looked*, actions which are so natural at an ordinary time of day, 3 p.m., and may have such divers ends and purposes, that it is not possible to classify them in the category of criminal intentions. At any rate, this weak evidence of resemblance does not even rest upon a positive, proven fact, that he is the author of a punishable act, but upon other evidence even more remote and far-fetched, that of having arrived and looked towards a garage—actions which are so usual and natural in view of the time and place that they cannot reasonably be a source of any suspicion. So flimsy a deduction, resting on another more flimsy and far-fetched deduction, does not constitute the well-founded indications required by our law to order the detention of a citizen."

[Report : I *Gaceta Forense*, No. 5 (August 1951), p. 110.]

NOTE.—This case has been reported in some detail—largely for the reason that it illustrates the length to which tribunals in some countries deem it incumbent to go in the direction of examining the substance of the charge levied against the person whose extradition is requested. It may also be noted that the other person concerned in the indictment was Raul Haya de la Torre, who figured prominently in the *Asylum* case decided in 1950 by the International Court of Justice (see *infra*, Case No. 90).

Extradition—Conditions of—Absence of the Accused.

Case No. 86

In *Re Colmenares*, decided by the Supreme Court of Colombia on November 7, 1950, it was *held* in a proceeding initiated at the request of Venezuela for the extradition of Carlos Colmenares for illegal appropriation or abuse of confidence that the extradition of a person may be decreed even where the accused cannot be found and his presence in the country is open to doubt.

[Report : 68 *Gaceta Judicial* (1950), p. 597.]

Extradition—Conditions of—Necessity for Validly Subsisting Treaty Incorporated into Municipal Law—The Law of Singapore.

See Case No. 21 (*Re Westerling*).

Extradition—Conditions of—Extradition for Offences not Included in the Treaty.

See Case No. 4 (*Babu Ram Saksena* v. *The State*).

IV.—Procedure of Extradition

Case No. 87 **Extradition—Procedure of—Judicial Opinions on Request for Extradition—The Law of Belgium.**

In re PARADISO.

Belgium, Court of Cassation (*Vacation Court*).
September 7, 1950.

THE FACTS.—This was an appeal against the opinion on a request for the extradition of the appellant handed down by the Chambre des Mises en Accusation of the Court of Appeal of Brussels on July 26, 1950.

Held : that no appeal lay against judicial opinions on requests for extradition. The Court said :

" The law of 15 March 1874 invested the Government with the authority to take decisions, on its own exclusive responsibility, with regard to requests for extradition submitted by a foreign Government, after having taken the opinion of the Chambre des Mises en Accusation of the Court of Appeal within the jurisdiction of which the alien was arrested. That opinion does not bind the Government ; it neither denies nor grants any right to the alien. It is accordingly not a decision which, according to Article 15 of the law of 4 August 1837, can give rise to an appeal to the Court of Cassation."

[Report : *Pasicrisie belge*, 1950, I, p. 853.]

V.—Political Offences

Case No. 88 **Extradition—Offences Subject to Extradition—Collaboration with the Enemy—Political Offences—Treaties—Municipal Operation of—Exchange of Notes between France and Belgium.**

In re VAN BELLINGHEN.

France, Court of Appeal of Paris. November 28, 1950.

THE FACTS.—This was a request by the Belgian Government for the extradition of Van Bellinghen, who had been sentenced to eight years' imprisonment by the Conseil de Guerre of Brussels for having knowingly directed and practised a policy aimed against the Resistance to the enemy. The question before the Court was whether this was an offence subject to extradition, or whether it must be considered to be a political offence.

Held : that extradition could not be granted. The offence was political in character. French law did not permit extradition for political offences. The Court said :

" The acts which led to the conviction are not provided for in the Franco-Belgian Convention of 15 August 1874. They are political in character, and are thus not subject to extradition in conformity with Article 3 of that Convention and with Article 5, paragraph 2, of the law of 10 March 1927. In France they constitute crimes against the external safety of the State, provided for in Article 75 *et seq*. of the Penal Code. Since the promulgation of the Constitution of 1848 and the law of 8 June 1850 these crimes have been considered to be political offences. It is true that the decree-law of 17 June 1938 provided that crimes against the external safety of the State should be tried by military or naval tribunals, and punished with common law penalties, and that the decree-law of 29 July 1939 . . . lays down common law penalties. However, it states that, for the application of penalties, crimes against the external safety of the State are to be considered to be common crimes. It thus establishes a fiction without affecting the political character of the offence.

" The law of 10 March 1927 applies only in the absence of a treaty. However, that provision of its Article 1 was inserted only for reasons of constitutional scruple. Article 8, paragraph 1, of the law of 16 July 1875 concerning the relations of public powers gave the President of the Republic the right to negotiate and ratify treaties, provided that he informed the Chambers as soon as the interests and the safety of the State permitted it. Extradition treaties were not expressly mentioned in the enumeration given in paragraph 2 of the same Article of treaties which were binding only after approval by the Chambers. A controversy arose whether the words ' treaties concerning the status of persons ' in that enumeration covered extradition treaties. That controversy has become academic since the enactment of the Constitution of 27 October 1946. Title iv of that Constitution, after recognising the supremacy of treaties over French municipal law, gives, in Article 27, an enumeration of treaties similar to that given in paragraph 2 of Article 8 of the constitutional law of 16 July 1875, but states, in addition, quite generally, that treaties which modify French laws are binding only after they have been ratified by means of the enactment of a law.

" Accordingly, in the absence of a law abrogating Article 5, paragraph 2, of the Law of 10 March 1927 (such as the Belgian law of 8 July 1946 permitting the surrender of collaborators to allied Governments on the basis of reciprocity), and in the absence of an international agreement submitted to the National Assembly and adopted by it, extradition for a political offence cannot be granted.

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"The reciprocity agreement with Belgium of December 1946, which took the form of an exchange of notes, was not published or ratified, and was in any case not approved by a law. It thus cannot override Article 5, paragraph 2, of the law of 10 March 1927 and Article 27 of the Constitution."

[Report: *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 440.]

NOTE.—See, to the same effect, *In re Van Erck* (*Revue critique de Droit international privé*, 40 (1951), p. 486), decided by the Court of Appeal of Rouen on October 31, 1950.

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

II.—Position and Functions of Diplomatic Envoys

Diplomatic Privileges and Immunities—Persons Charged with War Crimes. **Case No. 89**

In re ABETZ.

France, Court of Cassation, Criminal Division. July 28, 1950.

THE FACTS.—On July 12, 1949, the appellant was sentenced by the Military Tribunal of Paris to 20 years' penal servitude on charges of war crimes. He appealed on the ground that at the time of the commission of the offences he had been the accredited ambassador of the German Government to the French Government, and that the representatives of foreign States were immune from criminal jurisdiction in respect of acts committed in the exercise of their functions or during the period of their functions, unless the home State agreed to the prosecution.

Held : that the appeal must be rejected. The Court said :

" It does not appear from any documents before the Court that Abetz was accredited as ambassador by the German Government to the Vichy Government. No conclusions on this point were submitted by the accused to the lower Court. The ground of appeal is thus a mixture of fact and law which cannot be considered by the Court of Cassation.

" Moreover, the Ordinance of 28 August 1944 concerning the punishment of war crimes excludes by its very object the application of a rule of municipal or of international law the effect of which would be to make a prosecution subject to preliminary authorisation of the Government of the country to which the accused belongs."

[Report : *Revue critique de Droit international privé,* 40 (1951), p. 477.]

Diplomatic Immunity—In General—Immunity in Respect of Real Property.

See Case No. 91 (*Agostini* v. *De Antueno*).

Diplomatic Immunity—In General—Status of Persons Accredited to Governments not actually Independent of the Sending State—Whether Answerable for War Crimes.

See Case No. 146 (*In re Best and Others*).

III.—Privileges and Immunities of Diplomatic Envoys

iv.—The Official Residence

Case No. 90 **Diplomatic Intercourse—Legation Buildings—Asylum in—Power to Grant Asylum—Power to Qualify Unilaterally Nature of the Offence—Grant of Asylum Conceived as Intervention—Duty to Grant Safe-Conduct—Meaning of the Expression " Urgent Cases "—Requirements of the Creation of Customary International Law—Havana Convention of 1928—Limits of Admissibility of Counter-Claims.**

ASYLUM CASE.
(*Colombia/Peru.*)

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo, Judges ; M. Alayza y Paz Soldán and M. Caicedo Castilla, Judges *ad hoc*.)

Judgment of November 20, 1950.

THE FACTS.[1]—On October 3, 1948, a military rebellion broke out in Peru. It was suppressed on the same day and investigations were opened at once. A decree of October 4 charged the American People's Revolutionary Alliance (Apra) with having organized and directed the rebellion, and consequently outlawed the party. " A note of denunciation " was sent by the Minister of the Interior to the Minister for the Navy against M. Victor Raul Haya de la Torre, leader of the Apra, whose arrest was ordered on October 25. On October 27 a military junta seized the supreme power and, on November 4, issued a decree providing for courts martial with summary powers in cases of rebellion, fixing short time-limits and prescribing severe punishments without appeal.

On November 16 and the two subsequent days, summonses were published in the official gazette of Peru requiring " the accused persons who are in default ", Haya de la Torre and others, to report to the Office of the Examining Magistrate and answer the accusation " for the crime of military rebellion ".

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[1] The statement of Facts is taken largely from the *Year Book* of the Court for 1950–1951, p. 79.

Haya de la Torre did not report. A state of siege had been declared on October 4 and was renewed on November 2 and December 2, 1948, and January 2, 1949, suspending certain constitutional rights. On January 3, Haya de la Torre sought asylum in the Colombian Embassy at Lima, and on the following day the Colombian Ambassador notified the Peruvian Minister for Foreign Affairs and Public Worship, demanding the issue of a safe-conduct so that the refugee might leave the country " with the usual facilities attaching to the right of diplomatic asylum ". This measure having been refused, a diplomatic correspondence followed, leading up to the Act of Lima of August 31, 1949, and the submission of the dispute to the International Court of Justice.

" On October 15th, 1949, the Colombian Government filed in the Registry an Application requesting the Court :

> ' To pass judgment on and answer, whether the Government of the Republic of Peru enters an appearance or not, and after such time-limits as the Court may fix in the absence of an agreement between the Parties, the following questions :
>
> ' *First question.*—Within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928, both in force between Colombia and Peru and in general from American international law, was Colombia competent as the country granting asylum to qualify the offence for the purposes of said asylum ?
>
> ' *Second question.*—In the specific case under consideration, was Peru as the territorial State bound to give the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person ? ' "

Held (by fourteen votes to two) : (*a*) that " Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru " (at p. 278).

(*b*) (by ten votes to six) : " that the grant of asylum by the Colombian Government to Victor Raul Haya de la Torre was not made in conformity with Article 2, paragraph 2 (' First '), of that Convention " (at p. 288). The Court said :

I. *The Right of Unilateral Qualification of the Offence in relation to Asylum. Relevance of the Law of Extradition. Grant of Asylum and Intervention.*—" If the Colombian Government by [its] submission intended to allege that Colombia, as the State granting asylum, is competent to qualify the offence only provisionally and without binding effect for Peru, the solution would not remain a matter of doubt. It is evident that the diplomatic representative who has to determine whether a refugee is to be granted asylum or not must have the competence to make such a provisional qualification of any offence alleged to have been committed by the refugee. He must in fact examine the question whether the conditions required for granting asylum are fulfilled. The territorial State would not thereby be deprived of its right to contest the qualification. In case of disagreement between the two States, a dispute would arise which might be settled by the methods provided by the Parties for the settlement of their disputes.

" This is not, however, the meaning which the Colombian Government has put on its submission. It has not claimed the right of qualification for the sole purpose of determining its own conduct. The written and oral arguments submitted on behalf of that Government show that its claim must be understood in the sense that Colombia, as the State granting asylum, is competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru. Colombia has based this submission partly on rules resulting from agreement, partly on an alleged custom.

" The Colombian Government has referred to the Bolivarian Agreement of 1911, Article 18, which is framed in the following terms :

> ' Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.'

" In recognizing ' the institution of asylum ', this article merely refers to the principles of international law. But the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum.

" The Colombian Government has also relied on Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.

" In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

" In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

" For these reasons, it is not possible to deduce from the provisions of agreements concerning extradition any conclusion which would apply to the question now under consideration.

" The Colombian Government further relies on the Havana Convention on Asylum of 1928. This Convention lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State. The Colombian Government contends, however, that such a competence is implied in that Convention and is inherent in the institution of asylum.

" A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned ; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.

" These considerations show that the alleged right of unilateral and definitive qualification cannot be regarded as recognized by implication in the Havana Convention. Moreover, this Convention, in pursuance of the desire expressed in its preamble of ' fixing the rules ' which the Governments of the States of America must observe for the granting of asylum, was concluded with the manifest intention of preventing the abuses which had arisen in the previous practice, by limiting the grant of asylum. It did so in a number of ways and in terms which are unusually restrictive and emphatic (' It is not permissible for States . . .' ; ' Asylum may not be granted except in urgent cases and for the period of time strictly indispensable . . .' etc.).

" The Colombian Government has invoked Article 2, paragraph 1, of the Havana Convention, which is framed in the following terms :

> ' Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country, in which granted and in accordance with the following provisions :'

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" This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

" The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It was in fact this Convention which was invoked in the note of January 14th, 1949, from the Colombian Ambassador to the Peruvian Minister for Foreign Affairs. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Articles 6 and 7 of the Montevideo Convention provide that it shall be ratified and will enter into force as and when the ratifications are deposited. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State. The fact that it was considered necessary to incorporate in that Convention an article accepting the right of unilateral qualification, seems to indicate that this solution was regarded as a new rule not recognized by the Havana Convention. Moreover, the preamble of the Montevideo Convention states in its Spanish, French and Portuguese texts that it modifies the Havana Convention. It cannot therefore be considered as representing merely an interpretation of that Convention." (At pp. 273–276.)

II. *The Grant of Asylum and Requirements of Creation of Customary International Law.*—" The Colombian Government has finally invoked ' American international law in general '. In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

" The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ' as evidence of a general practice accepted as law '.

" In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

" It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connexion. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

" Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

" The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But

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even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum." (At pp. 276–278.)

III. *Duty of the Territorial State to Grant Safe-Conduct.*—" In its second submission, the Colombian Government asks the Court to adjudge and declare :

> ' That the Republic of Peru, as the territorial State, is bound in the case now before the Court, to give the guarantees necessary for the departure of M. Victor Raul Haya de la Torre from the country, with due regard to the inviolability of his person.'

" This alleged obligation of the Peruvian Government does not entirely depend on the answer given to the first Colombian submission relating to the unilateral and definitive qualification of the offence. It follows from the first two articles of the Havana Convention that, even if such a right of qualification is not admitted, the Colombian Government is entitled to request a safe-conduct under certain conditions.

" The first condition is that asylum has been regularly granted and maintained. It can be granted only to political offenders who are not accused or condemned for common crimes and only in urgent cases and for the time strictly indispensable for the safety of the refugee. These points relate to the Peruvian counter-claim and will be considered later to the extent necessary for the decision of the present case.

" The second condition is laid down in Article 2 of the Havana Convention :

> ' Third: The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible ; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person.'

" If regard is had, on the one hand, to the structure of this provision which indicates a successive order, and, on the other hand, to the natural and ordinary meaning of the words ' in turn ', this provision can only mean that the territorial State may require that the refugee be sent out of the country, and that only after such a demand can the State granting asylum require the necessary guarantees as a condition of his being sent out. The provision gives, in other words, the territorial State an option to require the departure of the refugee, and that State becomes bound to grant a safe-conduct only if it has exercised this option.

" A contrary interpretation would lead, in the case now before the Court, to the conclusion that Colombia would be entitled to decide alone whether the conditions provided by Articles 1 and 2 of the Convention for the regularity of asylum are fulfilled. Such a consequence obviously would be incompatible with the legal situation created by the Convention.

" There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements : the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged ; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to whom such a request for a safe-conduct has been addressed, is legally bound to accede to it.

" In the present case, the Peruvian Government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian Government is not entitled to claim that the Peruvian Government should give the guarantees necessary for the departure of Haya de la Torre from the country, with due regard to the inviolability of his person." (At pp. 278–279.)

IV. *" Common Crimes " and the Right to Grant Asylum.*— With regard to the contention, raised in the counter-claim of Peru, to the effect that the grant of asylum was, in the circumstances of the case, unlawful for the reason that the offence in question was in the nature of a common crime, the Court said :

" The Government of Peru has based its counter-claim on two different grounds which correspond respectively to Article 1, paragraph 1, and Article 2, paragraph 2, of the Havana Convention.

" Under Article 1, paragraph 1, ' It is not permissible for States to grant asylum . . . to persons accused or condemned for common crimes. . . .' The onus of proving that Haya de la Torre had been accused or condemned for common crimes before the grant of asylum rested upon Peru.

" The Court has no difficulty in finding, in the present case, that the refugee was an ' accused person ' within the meaning of the Havana Convention, inasmuch as the evidence presented by the Government of Peru appears conclusive in this connexion. It can hardly be agreed that the term ' accused '

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occurring in a multilateral treaty such as that of Havana has a precise and technical connotation, which would have the effect of subordinating the definition of ' accused ' to the completion of certain strictly prescribed steps in procedure, which might differ from one legal system to another.

" On the other hand, the Court considers that the Government of Peru has not proved that the acts of which the refugee was accused before January 3rd/4th, 1949, constitute common crimes. From the point of view of the application of the Havana Convention, it is the terms of the accusation, as formulated by the legal authorities before the grant of asylum, that must alone be considered. As has been shown in the recital of the facts, the sole accusation contained in all the documents emanating from the Peruvian legal authorities is that of military rebellion, and the Government of Peru has not established that military rebellion in itself constitutes a common crime. Article 248 of the Peruvian Code of Military Justice of 1939 even tends to prove the contrary, for it makes a distinction between military rebellion and common crimes by providing that : ' Common crimes committed during the course of, and in connexion with, a rebellion, shall be punishable in conformity with the laws, irrespective of the rebellion '.

" These considerations lead to the conclusion that the first objection made by the Government of Peru against the asylum is not justified and that on this point the counter-claim is not well founded and must be dismissed." (At pp. 281–282.)

V. *The Conception of " Urgent Cases " in Treaties Providing for the Grant of Asylum. Grant of Asylum, Operation of Natural Justice, and the Principle of Non-Intervention.*—" The Government of Peru relies, as a second basis for its counter-claim, upon the alleged disregard of Article 2, paragraph 2, of the Havana Convention, which provides as follows : ' Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety '.

" Before proceeding to an examination of this provision, the Court considers it necessary to make the following remark concerning the Havana Convention in general and Article 2 in particular.

" The object of the Havana Convention, which is the only agreement relevant to the present case, was, as indicated in its preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations. The intention was, as has been stated above, to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording of Articles 1 and 2 of the Convention which is at times prohibitive and at times clearly restrictive.

" Article 2 refers to asylum granted to political offenders and lays down in precise terms the conditions under which asylum granted to such offenders shall be respected by the territorial State. It is worthy of note that all these conditions are designed to give guarantees to the territorial State and appear, in the final analysis, as the consideration for the obligation which that State assumes to respect asylum, that is, to accept its principle and its consequences as long as it is regularly maintained.

" At the head of the list of these conditions appears Article 2, paragraph 2, quoted above. It is certainly the most important of them, the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee. It was incumbent upon the Government of Colombia to submit proof of facts to show that the abovementioned condition was fulfilled.

" It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population. It has been contended by the Government of Colombia that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. At that time, three months had elapsed since the military rebellion. This long interval gives the present case a very special character. During those three months, Haya de la Torre had apparently been in hiding in the country, refusing to obey the summons to appear of the legal authorities which was published on November 16th/18th, 1948, and refraining from seeking asylum in the foreign embassies where several of his co-accused had found refuge before these dates. It was only on January 3rd, 1949, that he sought refuge in the Colombian Embassy. The Court considers that, prima facie, such circumstances make it difficult to speak of urgency.

" The diplomatic correspondence between the two Governments does not indicate the nature of the danger which was alleged to threaten the refugee. Likewise, the Memorial of the Government of Colombia confines itself to stating that the refugee begged the Ambassador to grant him the diplomatic protection of asylum as his freedom and life were in jeopardy. It is only in the written Reply that the Government of Colombia described in more precise terms the nature of the danger against which the refugee intended to request the protection of the Ambassador. It was then claimed that this danger resulted in particular from the abnormal political situation existing in Peru, following the state of siege proclaimed on October 4th, 1948, and renewed successively on November 2nd, December 2nd, 1948, and January 2nd, 1949; that it further resulted from the declaration of 'a state of national crisis' made on

October 25th, 1948, containing various statements against the American People's Revolutionary Alliance of which the refugee was the head; from the outlawing of this Party by the decree of October 4th, 1948; from the Order issued by the acting Examining Magistrate for the Navy on November 13th, 1948, requiring the defaulters to be cited by public summons; from the decree of November 4th, 1948, providing for Courts-Martial to judge summarily, with the option of increasing the penalties and without appeal, the authors, accomplices and others responsible for the offences of rebellion, sedition or mutiny.

"From these facts regarded as a whole the nature of the danger now becomes clear, and it is upon the urgent character of such a danger that the Government of Colombia seeks to justify the asylum—the danger of political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive.

"It is therefore necessary to examine whether, and, if so, to what extent, a danger of this kind can serve as a basis for asylum.

"In principle, it is inconceivable that the Havana Convention could have intended the term 'urgent cases' to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to 'the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety', the Convention envisaged protection from the operation of regular legal proceedings.

"It would be useless to seek an argument to the contrary in Article 1 of the Havana Convention which forbids the grant of asylum to persons 'accused or condemned for common crimes' and directs that such persons shall be surrendered immediately upon request of the local government. It is not possible to infer from that provision that, because a person is accused of political offences and not of common crimes, he is, by that fact alone, entitled to asylum. It is clear that such an inference would disregard the requirements laid down by Article 2, paragraph 2, for the grant of asylum to political offenders.

"In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word 'safety', which in Article 2, paragraph 2, determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention.

" It is true that successive decrees promulgated by the Government of Peru proclaimed and prolonged a state of siege in that country; but it has not been shown that the existence of a state of siege implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. As for the decree of November 4th, 1948, providing for Courts-Martial, it contained no indication which might be taken to mean that the new provisions would apply retroactively to offences committed prior to the publication of the said decree. In fact, this decree was not applied to the legal proceedings against Haya de la Torre, as appears from the foregoing recital of the facts. As regards the future, the Court places on record the following declaration made on behalf of the Peruvian Government:

> ' The decree in question is dated November 4th, 1948, that is, it was enacted one month after the events which led to the institution of proceedings against Haya de la Torre. This decree was intended to apply to crimes occurring after its publication, and nobody in Peru would ever have dreamed of utilizing it in the case to which the Colombian Government clumsily refers, since the principle that laws have no retroactive effect, especially in penal matters, is broadly admitted in that decree. If the Colombian Government's statement on this point were true, the Peruvian Government would never have referred this case to the International Court of Justice.'

" This declaration, which appears in the Rejoinder, was confirmed by the Agent for the Government of Peru in his oral statement of October 2nd, 1950.

" The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin-American republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, a legal system which would

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guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin America, namely, non-intervention. It was at the Sixth Pan-American Conference of 1928, during which the Convention on Asylum was signed, that the States of Latin America declared their resolute opposition to any foreign political intervention. It would be difficult to conceive that these same States had consented, at the very same moment, to submit to intervention in its least acceptable form, one which implies foreign interference in the administration of domestic justice and which could not manifest itself without casting some doubt on the impartiality of that justice.

" Indeed the diplomatic correspondence between the two Governments shows the constant anxiety of Colombia to remain, in this field as elsewhere, faithful to the tradition of non-intervention. Colombia did not depart from this attitude, even when she found herself confronted with an emphatic declaration by the Peruvian Minister for Foreign Affairs asserting that the tribunal before which Haya de la Torre had been summoned to appear was in conformity with the general and permanent organization of Peruvian judicial administration and under the control of the Supreme Court. This assertion met with no contradiction or reservation on the part of Colombia. It was only much later, following the presentation of the Peruvian counter-claim, that the Government of Colombia chose, in the Reply and during the oral proceedings, to transfer the defence of asylum to a plane on which the Havana Convention, interpreted in the light of the most firmly established traditions of Latin America, could provide it with no foundation.

" The foregoing considerations lead us to reject the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States ; besides which, no confirmation of this criterion can be found in Latin-American practice, as this practice has been explained to the Court.

" In thus expressing itself, the Court does not lose sight of the numerous cases of asylum which have been cited in the Reply of the Government of Colombia and during the oral statements. In this connexion, the following observations should be made :

" In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities. The facts which have been laid before the Court show that in a number of cases the persons who have enjoyed asylum were not, at the moment at which asylum was granted, the object of any accusation on the part of the judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.

" If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show, none the less, that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested governments inspired by mutual feelings of toleration and goodwill.

" In conclusion, on the basis of the foregoing observations and considerations, the Court considers that on January 3rd/4th, 1949, there did not exist a danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention.

" This finding implies no criticism of the Ambassador of Colombia. His decision to receive the refugee on the evening of January 3rd, 1949, may have been taken without the opportunity of lengthy reflection ; it may have been influenced as much by the previous grant of safe-conducts to persons accused together with Haya de la Torre as by the more general consideration of recent events in Peru ; these events may have led him to believe in the existence of urgency. But this subjective appreciation is not the relevant element in the decision which the Court is called upon to take concerning the validity of the asylum ; the only important question to be considered here is the objective existence of the facts, and it is this which must determine the decision of the Court.

" The notes of the Ambassador of Colombia of January 14th and February 12th, 1949, reflect the attitude of the Government towards the asylum granted by its Ambassador. The first of these confirms the asylum and claims to justify its grant by a unilateral qualification of the refugee. The

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second formulates a demand for a safe-conduct with a view to permitting the departure of the refugee, and has based this demand expressly on the 'international obligations' alleged to be binding on the Government of Peru. In thus expressing itself, the Government of Colombia definitely proclaimed its intention of protecting Haya de la Torre, in spite of the existence of proceedings instituted against him for military rebellion. It has maintained this attitude and this protection by continuing to insist on the grant of a safe-conduct, even when the Minister for Foreign Affairs of Peru referred to the existence of 'a judicial prosecution, instituted by the sovereign power of the State' against the refugee (notes of the Minister for Foreign Affairs of Peru of March 19th, 1949; of the Ambassador of Colombia of March 28th, 1949).

"Thus, it is clearly apparent from this correspondence that the Court, in its appraisal of the asylum, cannot be confined to the date of January 3rd/4th, 1949, as the date on which it was granted. The grant, as has been stated above, is inseparable from the protection to which it gives rise—a protection which has here assumed the form of a defence against legal proceedings. It therefore results that asylum has been granted for as long as the Government of Colombia has relied upon it in support of its request for a safe-conduct.

"The Court is thus led to find that the grant of asylum from January 3rd/4th, 1949, until the time when the two Governments agreed to submit the dispute to its jurisdiction, has been prolonged for a reason which is not recognized by Article 2, paragraph 2, of the Havana Convention." (At pp. 282–287.)

VI. *Procedure. The Limits of Admissibility of Counter-Claims.*—"This counter-claim is intended, in substance, to put an end to the dispute by requesting the Court to declare that asylum was wrongfully given, the grant of asylum being contrary to certain provisions of the Havana Convention. The object of the counter-claim is simply to define for this purpose the legal relations which that Convention has established between Colombia and Peru. The Court observes in this connexion that the question of the possible surrender of the refugee to the territorial authorities is in no way raised in the counter-claim. It points out that the Havana Convention, which provides for the surrender to those authorities of persons accused of or condemned for common crimes, contains no similar provision in respect of political offenders. The Court notes, finally, that this question was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court, and in fact the Government of Peru has not requested that the refugee should be surrendered.

"It results from the final submissions of the Government of Colombia, as formulated before the Court on October 6th, 1950, that that Government did not contest the jurisdiction of the Court in respect of the original counter-claim ; it did so only in respect of the addition made during the oral proceedings. On the other hand, relying upon Article 63 of the Rules of Court, the Government of Colombia has disputed the admissibility of the counter-claim by arguing that it is not directly connected with the subject-matter of the Application. In its view, this lack of connexion results from the fact that the counter-claim raises new problems and thus tends to shift the grounds of the dispute.

" The Court is unable to accept this view. It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe-conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts which are raised by the counter-claim. The direct connexion being thus clearly established, the sole objection to the admissibility of the counter-claim in its original form is therefore removed." (At pp. 280–281.)

[Report : *I.C.J. Reports*, 1950, p. 266.]

NOTE.—Judges Alvarez, Badawi Pasha, Read and Azevedo delivered Dissenting Opinions—mainly by reference to the decision of the Court relating to the meaning of " urgency ". On this point Judge Zoričić shared the view of the dissenting Judges.

C—OFFICIALS OF AND PERSONS ACCREDITED TO THE UNITED NATIONS

United Nations—Diplomatic Immunity—Secretary of Delegation to United Nations—Action for Possession of Premises Occupied by Person Entitled to Diplomatic Status—Whether Municipal Court Entitled to Exercise Jurisdiction—The Law of the United States of America—Construction of Treaties by Reference to Municipal Law—Headquarters Agreement with the United Nations. **Case No. 91**

AGOSTINI *v.* DE ANTUENO.

United States, Municipal Court of the City of New York, Borough of Manhattan, Third District. June 5, 1950.

THE FACTS.—The defendant, who was third secretary of the permanent delegation of Argentina to the United Nations and as such entitled to the privileges and immunities provided

Case No. 91 Contd. for in the Headquarters Agreement between the United Nations and the United States, was the tenant of premises situate in the Borough of Manhattan. The plaintiff, who was the landlord of these premises, instituted proceedings for possession in the Municipal Court of the Borough of Manhattan. Thereupon the defendant moved to set aside the service of process upon him, on the ground that he was entitled to diplomatic status and therefore not subject to the jurisdiction of the Municipal Court. On behalf of the plaintiff it was contended that, notwithstanding the defendant's diplomatic status, the Court was entitled to exercise jurisdiction *in rem* over realty situate within the Borough of Manhattan, the Constitution of the United States having reserved jurisdiction over realty to the state courts and the relevant statutes of New York State having seen fit not to exempt persons entitled to diplomatic status from such jurisdiction.

Held : that the Municipal Court of the Borough of Manhattan was entitled to exercise jurisdiction over real property situate within the Borough, notwithstanding that the tenant thereof otherwise enjoyed diplomatic immunity, and that the motion to set aside service of process must be dismissed. The Court said :

" The respondent herein appears specially and moves to vacate the service of the precept and to dismiss the same on the ground that this court has no jurisdiction of the person of the respondent, pursuant to Rule 107 of the Rules of Civil Practice and as provided for in the Constitution of the United States and section 256 of the Judicial Code of the United States (1948 Revised Judicial Code, 28 U.S.C.A. S. 1351).

" The respondent is a national and natural-born citizen of the Republic of Argentina. He is the third secretary of the permanent delegation of Argentina to the United Nations.

" Article V of the Headquarters Agreement between the United Nations and the United States of America, approved by the 80th Congress under Public Law 357, 61 Stat. 756, 762, provides :

' Article V—Resident Representatives to the United Nations.

' Section 15—(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

' (2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned . . . shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. . . .'

"The Constitution of the United States, in Article III, section 2, provides:

'The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls. . . .'

"The Judicial Code of the United States, in section 256, provides:

'Exclusive jurisdiction of the United States courts.

'The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States. . . .

'Eighth: Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.'

"By the provisions of the second clause of the sixth article of the Constitution of the United States, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land. In a juridical sense, federal treaties and federal statutes stand on the basis of absolute equality as between each other.

"The diplomatic privileges accorded to public ministers of foreign states, their staff and their servants, stems from ancient heritage. The ambassador does, by fiction of law and in the abstract, represent the person of his master. The diplomatic immunity extends not only to the person of any public minister, but also to his accredited and recognized retinue, and also protects his and their goods and chattels from being distrained, seized or attached by any writ or process of any court of the United States or of any state. See Revised Statutes, sec. 4063, 22 U.S.C.A. s. 252. These privileges are, of necessity, accorded to protect the person and personality of the diplomat and his suite.

"The constitutional structure of the United States makes it clear that there are limitations to the treaty-making powers of the Federal Government. Where the act of a state legislature is constitutional under its reserved powers, the Federal Government is bound to respect it in the negotiation and conclusion of its treaties and in the enactment of its laws. *Siemsen* v. *Bofer*, 6 Cal. 250.

"In the case of *Hammer* v. *Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann. Cas. 1918E, 724, the Supreme Court of the United States held in effect that all questions relative to custody and control of minor children were reserved exclusively to the states.

"A Kansas law regulating the sale of patent rights was

Case No. 91 *Contd.*

held by the court not to violate the right of Congress to issue patents, *Allen* v. *Riley*, 203 U.S. 347, 27 S.Ct. 95, 51 L.Ed. 216, 8 Ann. Cas. 137.

" In *Popovici State of Ohio, ex rel.* v. *Alger*, 1930, 280 U.S. 379, 50 S.Ct. 154, 155, 74 L.Ed. 489, the Supreme Court held, in an action brought against the vice-consul of Roumania for divorce, that the statute, secs. 24 and 233 of the Judicial Code of the United States, granting foreign consuls immunity from suits and proceedings in state courts did not apply. The court said (Holmes J.) : ' The language (of the statute) so far as it affects the present case is pretty sweeping, but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that, " the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States " . . . and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. . . .

" ' The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. Suits against consuls and vice-consuls *must* be taken to refer to ordinary civil proceedings. . . .

" ' Summary proceedings for the recovery of possession of realty by a landlord against a tenant are historically a matter of local concern in the same manner as proceedings for divorce. In *Woods* v. *O'Brien*, D.C. Mass. 1948, 78 F. Supp. 221, 222, the court, in considering an action brought by a landlord to evict a tenant as a contempt in violation of a federal court order, said : " This is not a proceeding to evict the petitioner. In fact this court has no jurisdiction with respect to such a proceeding. That is a matter for the state courts. . . ." ' "

" There appears to be no doubt that real property held by diplomatic officers in a foreign state, and not pertaining to their diplomatic status, is subject to local laws.

" The instant matter is a special proceeding to recover the possession of real property, and the Legislature of the State of New York has seen fit to invest this court with the unique power, authority and jurisdiction in this type of special proceeding. Secs. 1413, 1420, C.P.A. The jurisdiction of this court is basically *in rem*, and not *in personam*.

"The motion is therefore denied, and the respondent is to have five days within which to file an answer after service of a copy of the order."

[Report: 99 N.Y.S. 2d 245.]

D—CONSULS

Consuls—Immunities of—Acts of a Private Law Character—Waiver of Immunity.

See Case No. 38 (*Robine* v. *Consul of Great Britain*).

PART VIII

TREATIES

I.—Conception, Function, and Forms of Treaties

Treaties—Kinds of—*Pacta de contrahendo*—Obligation to Negotiate—How far Implying a Substantive Obligation.

See Case No. 16 (*International Status of South-West Africa*).

Treaties—Various Forms of—Resolutions of the International Conference of American States.

See Case No. 15 (*Ruiz Alicea* v. *United States*).

Treaties—Special Kinds of—Concordats.

See Case No. 29 (*Concordat* (*Secrecy of Confessions*) *Case*).

IX.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[See also Part I, INTERNATIONAL LAW IN GENERAL: V, *Relation to Municipal Law*; and Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A. *In General*.]

Case No. 92

Treaties—Subsequent Municipal Legislation Modifying Contents of Treaty—Whether Treaty takes Precedence over Municipal Law—International Law—Relation to Municipal Law—Primacy of Treaties over Subsequent Inconsistent Legislation—The Law of the United States of America.

PETITION OF KWAN SHUN YUE.

United States, District Court for the Southern District of California (*Central Division*). *December* 29, 1950.

THE FACTS.—By virtue of treaties concluded between the United States and China in 1880 and 1894, respectively, Chinese merchants were granted, in so far as concerned their right to enter the United States, the same privileges as " are accorded to citizens and subjects of the most favored nation ", and they were further granted the right of residing in the United States if they produced a certificate of the competent diplomatic representative of the United States in the country of departure, to the effect that they were "treaty merchants". The Immigration Act of 1924 provided that an alien "entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation" was not an "immigrant" within the meaning of the Act and was not, in consequence, entitled to naturalization, persons of that class being able, by virtue of the Act, to be admitted for permanent residence and subsequent naturalization only if they had arrived in the United States before July 1, 1924. The petitioner arrived in the United States after that date, and his petition for naturalization was refused on the ground that, having arrived in the United States after July 1, 1924, he was not entitled to admission as a permanent resident and was, accordingly, precluded from naturalization by virtue of the Immigration Act, 1924. On behalf of the petitioner it was contended that by virtue of the most-favoured-nation treatment accorded to Chinese merchants, of whom he was one, he was entitled to be admitted for permanent residence and subsequent naturalization in the United States, and that as these treaties had to be given priority over subsequent municipal legislation, including the Immigration Act of 1924, his residence qualifications were sufficient to give him the right to obtain United States nationality by naturalization.

Held: that the treaties took priority over subsequent municipal legislation, and as they conferred the right upon the petitioner to take up permanent residence in the United States and as he had been so resident for the requisite number of years, his application for naturalization must be granted. The Court said:

"The facts, as found by the designated Examiner, show that petitioner applied for admission to the United States at Seattle, Washington, July 20, 1924, in possession of a certificate, as a treaty merchant, issued under Section 6 of the Chinese Exclusion Act, 22 Stat. 58, Act of May 6, 1882, as amended. The certificate had been visaed by the American Consul at Hong Kong, June 27, 1924. On September 9, 1924, the Board of Review of the Department of Labor ordered the subject excluded on the ground that he was not coming to the United States as a bona fide merchant under and in pursuance of any treaty of commerce and navigation.

"Habeas Corpus proceedings were instituted in behalf of petitioner and others in the District Court for the Western District of Washington, and the writ was granted. The judgment of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit on November 13, 1925, in the case of *Weedin* v. *Wong Tat Hing*, 6 F. 2d 201.

"The findings of the designated Naturalization Examiner

Case No. 92 *Contd.* in the present proceeding for naturalization, contains the statement, ‘ A certificate of arrival, qualified to show the true character of his admission as a treaty merchant under Section 3 (6) of the Immigration Act of 1924 has been filed with the petition ’. 8 U.S.C.A. s. 203 (6).

" Petitions for the naturalization of Chinese aliens who, as children of treaty merchants, entered the United States after July 1, 1924, but whose fathers, the treaty merchants, entered the United States before July 1, 1924, have been before the courts and the cases have uniformly held that the admission of the treaty merchant (the father) prior to July 1, 1924, made legal the subsequent admission of the children to the United States, and that the child's residence was of such a permanent character as to be sufficient for naturalization purposes. Petition of *Wong Choon Hoi*, D.C.S.D.Cal., 71 F. Supp. 160, appeal dismissed *Carmichael* v. *Wong Choon Hoi*, 9 Cir., 164 F. 2d 696, on the ground that the appellant was not a proper party. *In re Chi Yan Cham Louie*, D.C.W.D.Wash., 70 F. Supp. 493, appeal dismissed *Bonham* v. *Chi Yan Cham Louie*, 9 Cir., 166 F. 2d 15, on the ground appellant was not a proper party. *In re Jow Gin*, 7 Cir., 175 F. 2d 299 ; *United States* v. *Yung Poy*, 9 Cir., 177 F. 2d 144.

" The Government now urges however, that because of the provisions of the Immigration Act of May 26, 1924, 43 Stat. 153, Title 8, U.S.C.A. s. 203 that the Congress, in substance, created two classes of people entering the United States, immigrants and non-immigrants, and that Congress, in the Act, deliberately excluded treaty merchants from the designation as immigrants (*i.e.* those coming for permanent residences) and listed them with the non-immigrants, and that therefore petitioner, arriving after July 1, 1924, was not admitted to the United States for permanent residence and cannot be naturalized.

" It is elemental that Congress, by statute, cannot vary or diminish rights created under a treaty, and the courts have consistently held that the various Immigration acts passed after the treaties with China in 1880 and 1894, do not abrogate, nullify or abridge the rights of Chinese to enter pursuant thereto. *Haff* v. *Yung Poy*, 9 Cir., 1933, 68 F. 2d 203.

" We choose to rely particularly on the decision by Judge Mathes in the petition of *Wong Choon Hoi*, D.C., 71 F. Supp. 160, *supra*. It is well reasoned and collects the authorities. The factual situation in that case concerned the son of a Chinese merchant who had entered the United States in 1934, while his father had previously entered the United States before July 1, 1924. The case holds that the minor son, upon entry, acquired the domicile of his father and that the domicile was sufficient to permit the naturalization of the son. The reasoning of the case, and the authorities, apply equally to a treaty merchant entering the United States after July 1, 1924.

" But it further appears to the court that the language of the articles of the two treaties (heretofore set forth in the margin),[1] contain in their very language provisions that the treaty merchant shall have domicile or permanent residence in the United States.

" The Treaty of 1880 in Article II, provides that Chinese merchants ' shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation '. This certainly would include the right to permanent residence or domicile sufficient for naturalization.

" The Treaty of 1894, in Article III, provides that ' The provisions of this Convention shall not affect the right at present enjoyed of Chinese . . . merchants . . . of coming to the United States and *residing therein* '. The words, ' residing therein ' indicate clearly the intention of the treaty making powers to provide for permanent residence or domicile in the United States on the part of Chinese merchants and the other classes therein enumerated.

" The Government cites cases to the effect that the mere fact that an alien is not deportable does not create a status of lawful permanent residence in the United States. *Subhi Mustafa Sadi* v. *U.S.*, 2 Cir., 48 F. 2d 1040 ; *Werblow* v. *U.S.*, 2 Cir., 134 F. 2d 791.

" The court has no disagreement with these holdings.

" We hold that the petitioner was lawfully admitted to the United States for permanent residence sufficient for naturalization purposes ; and in view of the findings by the designated Examiner that the petitioner, upon his application for admission to the United States was in possession of a certificate as a treaty merchant issued under Section 6 of the Chinese Exclusion Act, and that a certificate of arrival qualified to show the character of his admission as a treaty merchant under Section 3 (6) of the Immigration Act of 1924 has been filed with his petition, it follows that both grounds of objection by the United States fail.

" The motion of the United States is denied and the application of Kwan Shun Yue for naturalization is granted. The findings of fact, conclusions of law and recommendations of the designated Examiner are adopted by this court, except as they are modified by this opinion. . . ."

[Report : 94 F. Supp. 804.]

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[1] In this report the wording of the treaties is not set out ; for operative parts thereof see The Facts, *supra*.

Case No. 93

Treaties—Enforcement of—Absence of Means of Enforcement as a Factor Relieving a Government of Contractual Liability—"Lend-Lease"—Licence Under United States Patent—Licence Granted to United States Government—Use of Licensed Process Accorded to Foreign State by United States Government Under "Lend-Lease"—Failure of Foreign State to Pay Royalties—Patentee's Remedy.

STRATFORD DEVELOPMENT CORPORATION *v.* UNITED STATES.

United States, Court of Claims. November 7, 1950.

THE FACTS.—The plaintiff, an American Corporation, was the registered owner of a United States patent. In consideration of the plaintiff's granting a licence under the patent to the Government of the United States the latter undertook to pay to the plaintiff a lump sum royalty in respect of a fixed period of time. Under the terms of the licence the United States Government were entitled to grant to the Government of the Soviet Union, in accordance with the Lend-Lease Act (22 U.S.C.A., ss. 411 *et seq.*), the right to use the patented process. Section 7 of the Act provided that it was the duty of the United States Government, when granting rights in such circumstances, fully to protect the rights of the owners of the patents. The Mutual Aid Agreement between the United States and the Soviet Union provided, *inter alia*, that the latter would make payment in respect of patent user when requested to do so by the President of the United States. At the expiration of the period of time in respect of which the United States Government had paid to the plaintiff a lump sum royalty as stated, the Soviet Government was informed that its right to use the patented process had come to an end. Notwithstanding this notification, the Soviet Government continued to use the process, and in spite of demands by the United States Government to pay for such user it refused to pay any royalties. Thereupon the plaintiff instituted proceedings against the United States Government for breach of contract, the contention being that in breach of its duty under section 7 of the Lend-Lease Act the United States Government had failed to protect its rights. The United States Government, on the other hand, contended that it had done all it could lawfully do to protect the plaintiff's rights, viz. that it had attempted by diplomatic means to persuade the Soviet Government to pay royalties, and such attempts having failed, it could not be held liable for any alleged breach of duty.

Held : that there was no breach of contract on the part of the United States Government, and that the plaintiff's petition must be dismissed. The Court said :

" What the Government did, in fact, in the direction of protecting the plaintiff, was to require the Soviet Government to enter into Article IV of the Mutual Aid Agreement, which article was quoted and incorporated in the plaintiff's licensing agreement with the Government. That Article, which we have quoted in finding 9, seems to us to amount to a promise by the Soviet Government to compensate the American owner of a patent which the Soviet Government was using, if it continued to use the patent after the United States ceased to pay the patent owner out of Lend-Lease funds. The requirement that the Soviet Government agreed to do this has not, in fact, resulted in the plaintiff's being paid, because the Soviet Government has failed to perform its promise. Did the taking of the promise by our Government at the time the plant was transferred to Russia ' fully protect ' the plaintiff, as Section 7 of the Lend-Lease Act, incorporated in the plaintiff's licensing agreement, required ?

" In attempting to answer the question just posed, it is necessary to consider what steps Congress might have had in mind, in imposing, in Section 7 of the Lend-Lease Act, upon the officers of the Government the duty to ' fully protect ' the rights of the American patent holders. One effective way to protect them would have been to require the foreign government, the recipient of the Lend-Lease aid, to deposit money or property by way of pledge to secure its performance of its obligation, in this case evidenced by Article IV of the Mutual Aid Agreement between the United States and the Soviet Union. We feel sure that Congress did not contemplate the requirement of the deposit of such security. The purpose of Lend-Lease was to assist our hard-pressed allies by transferring to them things which they could not afford to buy and pay for. They would not, then, have been expected to have resources which they could deposit as a pledge in the United States to secure their performance of their promises of post-war contingent payments.

" The plaintiff has not been able to suggest what steps it thinks the agents of the Government should have taken, but neglected to take, to protect the plaintiff's rights. It says that the Government's obligation ' did not fall far short of indemnification ' of the plaintiff for future use of its patents and ' know-how '. But if the obligation fell short at all of indemnification, what did it contemplate ? As to indemnification, we think it is clear that Congress did not intend that. Section 7 relates to the agreements expected to be made between the United States and foreign governments. It says that *in such agreements* the officers of the United States shall fully protect the rights of American patent owners. The protection, then, was to be accomplished in the agreement, or in connection with it. Here, for instance, the pledge which we have mentioned could have been required. But the agreement of our Government, in this case with the Soviet Union, would

Case No. 93 *Contd.* have been no place to insert a guaranty by the United States that it would, after the termination of Lend-Lease, go on paying royalties to an American patent holder for the use of his patent by the Soviet Union.

" We conclude, then, that Congress did not, by Section 7, require the Government to agree to indemnify the plaintiff against the Soviet Union's default. It required, what was really the only practical thing to do in the circumstances, that the Government take from the Soviet Union its promise to pay the plaintiff royalties if it continued to use its patents after the termination of Lend-Lease. Section 7 was, of course, applicable to all of the countries eligible for Lend-Lease assistance. Congress would naturally have expected that these allies of ours would, after the war, do what they had agreed to do and would hence have regarded the taking of their promises as a sufficient guaranty of performance.

" The plaintiff, when it licensed our Government to ship its patented devices and disclose its ' know-how ' to Russia, was as fully aware as was our Government that there were no means, other than diplomatic, to induce or compel the Soviet Union to do what it agreed to do. The findings show that our Government has done all that could usefully be done by those means, though its efforts have borne no fruit. We conclude that the United States has not breached its contract with the plaintiff and that the plaintiff's petition must be dismissed.

[Report : 93 F. Supp. 610.]

Case No. 94 **Treaties—Enforcement of—Self-Executing Treaties—Termination of Treaties—Effects on Municipal Law—International Law and Municipal Law—Supremacy of Municipal Law—The Law of Switzerland.**

THURGAU *v.* LANG AND LEGLER.

Switzerland, Federal Tribunal. January 27, 1950.

THE FACTS.—On November 27, 1947, the opening of the shooting season on the Untersee and Rhine, some ninety rowing-boats went out for a mass-shoot of wild birds. Lang and Legler appeared in two small planes, with the intention of scaring the birds away and thus saving them from the slaughter. The planes were flown very low, but not in such a manner as to constitute a danger to life or limb of persons on the ground. The order of the Federal Council of January 27, 1920, concerning transport by air provided, in Article 37, that any infringement of regulations made in pursuance of or supplementary to that order should be punishable. None of the regulations so made by the federal railway department provided that planes had to be flown at a certain height over open spaces, or over rowing-boats. The only provision relevant to the action of Lang and Legler was contained in Annex D to the Paris Convention relating to the regulation of Aerial Navigation of October 13, 1919. Paragraph 4 (3) of that Annex provided that air planes flying near water shall keep clear of shipping. Switzerland acceded to that Convention in October 1934 and denounced it as of December 1947. The question at issue in this case was whether the non-observance of the provisions of Annex D was punishable in pursuance of the order of the Federal Council of January 27, 1920. The Superior Court (Obergericht) of the Canton of Thurgau held, on April 14, 1949, that it was not so punishable. This was an appeal from that decision. It was contended on behalf of the appellant that the treaty could create regulations breaches of which were punishable, even though they had neither been incorporated in national law nor published in the national collection of laws. It was further contended that the relevant provision of Annex D was not limited by a national regulation of January 24, 1920, which prohibited low flying only in the vicinity of steamships.

Held : that the appeal must be dismissed. Treaty provisions did not require specific incorporation in national law. Moreover, they were superior to national law and thus could not be limited by it. But since the treaty had been denounced by Switzerland the provisions in question were no longer in force. The Court said :

" The respondents did not observe paragraph 4 (3) of Annex D to the Paris Convention, which provides that airplanes flying near water shall keep clear of shipping. It cannot be maintained that that provision is limited by paragraph 1 of the regulation of the Federal Council of 24 January 1921, for treaty law is superior to federal law. In any case the two regulations are not inconsistent and can be simultaneously observed.

" As a result of the accession of Switzerland to the Paris Convention the provisions of that Convention and of its Annexes became, without more, Swiss municipal law. The Annexes were law in the form given them by C.I.N.A. at any time, that commission having been empowered by the Convention to modify or supplement the Annexes. It cannot be maintained that Annex D to the Convention is not applicable to the present case because it was not issued in the form of an order from the Federal Council or the Federal Railway Department. The provisions of a treaty approved by the Federal Assembly have the same effect as internal laws, and must be applied as such. . . ."

" It is questionable, on the other hand, whether the publication of Annex D in the ' Aéro Revue ' of 1946, and its circulation amongst pilots, including the respondents, was sufficient

Case No. 94 *Contd.* to make it binding on the respondents, or whether it should not have been incorporated in the official collection of federal laws and regulations in pursuance of Article 33 of the federal law of October 9, 1902, concerning the form of publication of laws and orders. It is, however, not necessary to resolve that question, for the appeal cannot be allowed even if Annex D was binding on the respondents at the time of the commission of the act complained of.

" The Federal Council denounced the Paris Convention on 12 December 1946 with effect as of 12 December 1947. On that day accordingly, Annex D ceased to be in force. . . ."

[Report : *Entscheidungen des Schweizerischen Bundesgerichtes aus dem Jahre 1950. Amtliche Sammlung*, vol. 76, IV, p. 43.]

Case No. 95

Treaties—Operation of—Reciprocity—Subjugation of a State —Effect of Capitulation on Treaties between Capitulating State and Neutral States—Non-Political Treaties—Convention on Civil Procedure—Continued Operation of Convention.

SECURITY FOR COSTS (SWITZERLAND) CASE.

Federal Republic of Germany, Court of Appeal of Frankfurt.
March 27, 1950.

THE FACTS.—Germany and Switzerland both became parties to the Hague Convention on Procedure in Civil Cases, of July 17, 1905, by virtue of which plaintiffs of Swiss nationality were exempted from the requirement of providing security for costs in proceedings before German courts, and plaintiffs of German nationality were similarly exempted from providing security when instituting proceedings before Swiss courts. The plaintiff, a Swiss national, claimed this exemption on the ground that the Convention was still in force between the two countries. The defendant contended that in view of the unconditional surrender of Germany in 1945 the treaty had ceased to operate.

Held : that, whether or not the Convention was still in force, the plaintiff was entitled to claim exemption, on the ground that German plaintiffs before Swiss courts were entitled to the same privilege, the Swiss courts taking the view that the relative provision had become and remained part of Swiss municipal law. The Court said :

" By virtue of Article 110 of the Civil Procedure Act nationals of foreign States who act as plaintiffs are required, at the request of the defendant, to provide security for costs. If in such a case security has not been provided, the defendant shall raise the requisite plea in accordance with Article 274 (2) of the Civil Procedure Act. This provision does not apply, however, where by the laws of the country of which the plaintiff is a national a German national is not required to provide security in a similar case.[1] This exception applies to the present case.

" Article 17 of the Hague Convention on Procedure in Civil Cases, of July 17, 1905, to which both Switzerland and the German Reich have acceded, provides that no security shall be demanded from the nationals of one of the Contracting States who are domiciled in one of these States and who institute proceedings before the courts of another Contracting State, merely because they are foreign nationals. Switzerland, as is evidenced by the judgment of the ' Obergericht ' of the Canton of Zürich of December 1, 1945, and by the report of the Federal Justice and Police Departments therein referred to, considers herself, in relation to Germany, bound by the said Convention which by virtue of Article 113 (3) of the Swiss Federal Constitution has the force of law in Switzerland. Quite generally, collective treaties between Germany and neutral countries Parties thereto, including Switzerland, remain in force. Proclamation No. 2 of the Allied Control Council has in no way affected this position although it provides that the Allied representatives will issue their instructions concerning the re-entry into force or the application of conventions concluded by Germany. So far no instruction has been issued with regard to the Hague Convention on Procedure in Civil Cases. This fact might justify the inference that the German ' Länder ' are no longer bound by the Hague Convention. Even if this were to be assumed it would not follow, as the Court of Oldenburg argues, that a Swiss national is, for this reason, no longer exempt from the obligation to provide security for costs.

" The case referred to overlooks the fact that exemption from the obligation to provide security may be due to two causes. It may be based upon the positive provision contained in Article 17 of the Hague Convention on Procedure in Civil Cases, or it may be based upon Article 110 (2) of the Civil Procedure Act. In the former case the decisive question is whether the Hague Convention applies in Germany, and in the latter case whether it applies in Switzerland. We can leave undecided the question whether the Convention is at present operative in Germany and whether the plaintiff can claim exemption as the national of a State which is a Party to the Hague Convention. A Swiss national would be equally entitled to claim exemption even if the Hague Convention were not at present operative in Germany. The legal basis of the claim, in so far as a Swiss national is concerned, is not the Hague Convention *qua* international agreement, but Article 110 (2) of the Civil Procedure Act. In Switzerland the Hague Convention remains operative, and this is all that matters

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[1] This exception is contained in Article 110 (2) of the Civil Procedure Act.

Case No. 95 *Contd.* according to Article 110 (2) of the Civil Procedure Act. The non-performance of an international agreement by one Party does not, as the above-mentioned judgment of the Court of the Canton of Zürich rightly points out, relieve the other party of her contractual obligations ; it merely gives that Party the right to rescind. In Switzerland the Federal political authorities alone are entitled so to rescind. No such rescission had taken place when the above judgment was given, and the defendant has not contended for any such rescission subsequent thereto. Therefore the Hague Convention on Procedure in Civil Cases is, in so far as Switzerland is concerned, a Swiss municipal law, and consequently the requirements of the German enactment concerning exemption from the duty to provide security are satisfied.

" As, therefore, Germans in Switzerland are not, by virtue of an enactment there in force, obliged to provide security, the plea of the defendant is ill-founded."

[Report : *NJW.*, 4 (1951) 38.]

Case No. 96

Treaties—Operation and Enforcement of—Treaties and Constitutional Provisions—The Law of Mexico.

Re VALENZUELA.

Mexico, Supreme Court. January 13, 1950.

THE FACTS.—The complainant, Pedro Mario Valenzuela, sought federal protection (*amparo*) against the seizure of his automobile by federal authorities acting under the terms of the Convention with the United States of America for the recovery and restoration of stolen vehicles.[1]

Held : that *amparo* must be granted. Where enforcement of the Convention would involve a deprivation of personal property, such action may take place only on the basis of appropriate judicial proceedings. The judgment is summarized in the report as follows :

" It is charged that the act which is the basis of the complaint is violative of Article 14 of the Constitution which provides that no person may be deprived of his property without the intervention of appropriate judicial proceedings. The complainant has been dispossessed of his automobile on grounds (not proved) that it was stolen in the United States of America. While the proper procedure for the recovery of the vehicle has been anticipated in the Convention between Mexico and the United States of America for the recovery and restoration of stolen vehicles, this Supreme Court has found that certain federal authorities (the Secretary of Foreign Relations and the Procurator General of the Republic) have applied the Convention in an unconstitutional manner. According to the Convention, the authorities may employ 'all the appropriate means to secure the detention of the vehicles'. As this Chamber of the Supreme Court interprets this clause, the competent authorities must comply with the individual guarantees established in the Constitution, especially in Articles 15 and 133, the pertinent sections of which provide as follows: 'No treaties or conventions may be made by virtue of which the guarantees and rights established by this Constitution for man and the citizen might be altered'; 'This Constitution . . . the laws . . . shall be the Supreme Law of the whole Union'."

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[1] 180 *League of Nations Treaty Series* (1937–1938), p. 33.

[Report: 103 *Semanario Judicial de la Federación* (5a Época), pt. 1, p. 297.]

NOTE.—The same view was sustained by the Supreme Court on February 9, 1950, in the case of *Heraclio Espinosa*. And see to the same effect *In re Vera, Annual Digest*, 1948, Case No. 114.

Treaties—Municipal Operation of—Exchange of Notes neither Published nor Ratified—The Law of France.

See Case No. 88 (*In re Van Bellinghen*).

Treaties—Operation of—The United States of America—Construction of Treaties by Reference to Municipal Law—Headquarters Agreement with the United Nations.

See Case No. 91 (*Agostini* v. *De Antueno*).

Treaties—Operation of—Concordats.

See Case No. 29 (*Concordat* (*Secrecy of Confessions*) *Case*).

Treaties—Operation of—Protection of Rights of Individuals—Court Injunction against Disregard by State of Obligations Undertaken by International Agreement.

See Case No. 49 (*Aponno and Others* v. *The State of the Netherlands* (*Amboinese Soldiers' Case*)).

Treaties—Operation of—Requirement of Incorporation in Municipal Law—The Law of Singapore.

See Case No. 21 (*Re Westerling*).

Treaties—Operation of—Requirement of Incorporation in Municipal Law—The Law of India.

See Case No. 4 (*Babu Ram Saksena* v. *The State*).

Treaties—Operation of—Non-Ratified Treaties—Treaties not having the Effect of Law—Effect of.

See Case No. 82 (*Re Vigoni*).

Treaties—Succession to Treaty Rights—Colony Gaining Independent Sovereign Status—Indonesia.

See Case No. 21 (*Re Westerling*).

XI.—Termination of Treaties

Case No. 97 **Treaties — Termination of — Temporary Extinction of Contracting Party — Subsequent Reconstitution — Austria — Italo-Austrian Treaty of 1922 for the Enforcement of Judgments in Civil and Commercial Matters.**

Z. *v.* B.

Italy, Court of Appeal of Turin. June 14, 1950.

It was *held* that the Italo-Austrian Convention for the Enforcement of Judgments in Civil and Commercial Matters of April 6, 1922, which had fallen into abeyance as a result of the annexation of Austria by Germany in 1938, had automatically resumed its force in consequence of the revival of the Austrian Republic in 1945. The Court said:

"There is no reason to depart from the established practice [1] to the effect that, as a result of the revival of the Austrian Republic after having been incorporated in the German Reich, the treaties concluded by the Austrian Republic prior to the annexation have again come into force. One of these treaties is the Italo-Austrian Convention of 6 April 1922 which was incorporated into Italian law by the Royal Decree of 13 December 1923 no. 3181. . . ."

[Report: *Foro Italiano*, 74 (1951), I, 486, with a note by Udina.]

NOTE.—See Cansacchi in *Giurisprudenza Italiana*, 102 (1950), IV, 65, and De Nova in *Foro Padano*, 1949, I, 179.

Case No. 98 **Treaties—Termination of—Extinction of One of the Parties—Effect of—Palestine and Israeli Treaties concluded between Egypt and Palestine.**

ARAB BANK *v.* AHMED DAOUD ABOU ISMAIL.

Egypt, Tribunal of Port Said. November 26, 1950.

THE FACTS.—On March 19, 1950, the National Arab Bank obtained from the Tribunal of Sichem, Palestine, a judgment for 200 Palestinian pounds against Ahmed Daoud Abou

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[1] The Court appears to have referred to its own decision of July 28, 1948, *Foro Padano*, 1949, I, 180.

Ismail, together with costs and interest at 9 per cent. per annum on the judgment debt. The Bank moved in the Court of First Instance, Port Said, for execution of the judgment in Egypt, relying upon a Convention of January 12, 1929, between Egypt and Palestine relative to the reciprocal enforcement of judgments. Article 3 of that Convention authorized a party who desired the enforcement in Egypt of a Palestinian judgment to claim, within one year of the judgment, by a request addressed to the President of the Tribunal within whose jurisdiction the execution was requested, an *exequatur* which was to be drawn up in a certain form (Article 3 of the Decree of January 27, 1929, by which the Convention of January 12, 1929, became incorporated into Egyptian law). The Bank annexed to its request a copy of the judgment of March 19, 1950, rendered in its favour by the Tribunal of Sichem. The Judge of the Tribunal of Port Said, sitting as Judge of First Instance, having heard argument, decided, on the basis of Articles 491, 492 and 496 of the Egyptian Code of Procedure, to refer the case to the Full Court.

The defendant, Abou Ismail, maintained that the Convention of 1929 between Egypt and Palestine had fallen to the ground and was no longer in legal force, that the British Mandate in Palestine came to an end on May 15, 1948, the date when British military and civilian personnel left Palestine, and that the war in Palestine was finished and had formally been brought to a close by an armistice between the combatants. The defendant alleged that, in fact, though perhaps not in law, a partition of Palestine came into effect. According to this *de facto* partition the area neighbouring the borders of Egypt became, up to Gaza, subject to Egyptian control. Israel occupied the rest of the territory, and the area neighbouring the Hashemite Kingdom of Jordan, including the Sichem district, was annexed by Israel.

Held: that the Bank's application must fail. The Court said:

" No State has recognized the purported annexation by Israel. Egypt, as well as other Arab States, has rejected it, on the ground that it has been Egyptian policy, made known since the beginning of military operations, to assert that it was not in the guise of conquerors, or with the idea of making any territorial acquisitions, that the Arab States went to war with Israel, but solely with a view to enabling persons of Palestinian origin to restore their authority within their country and to put an end to Jewish terrorism. As a result, Palestine, in the sense contemplated by the Convention of 1929, no longer exists. The party with whom Egypt concluded the Convention concerning the reciprocal enforcement of judgments no longer exercises any authority over Sichem and has been replaced by another State. In virtue of the rules of public international law, the Convention has ceased to exist.

Case No. 98 Contd.

"The defendant also maintains that the judgment was rendered in the name of His Majesty, the King Abdullah Ebn El Hossain, that the authority which this ruler exercises over this piece of territory is illegal, and that the present claim is contrary to international public order, the judgment having been rendered by a tribunal without legal existence. It further appears that the judgment of which execution is requested lacks proper formal basis; there is nothing to show that the judgment ever acquired the authority of *res judicata*. Finally, the judgment awards interest at 9% per annum, whereas, under the Egyptian Civil Code, the maximum on judgment debts is 7%, and anything in excess of that is held usurious by our Courts and the rate of interest is contrary to Egyptian public order. In the circumstances which led to the dismemberment of Palestine, of which a portion—that portion which was the object of Jewish aggression—was occupied by the Jews without any legal claim of right, and the other part was occupied by the Kingdom of Hashemite Transjordan, whilst the part adjacent to Egypt fell under the control of the latter, it cannot be doubted that the position of Palestine when it concluded the Convention of 12 January 1929 was wholly different from what it is at the present day. This consideration moves the Court to declare the Convention of 1929 at an end. In addition to the above, the judgment of which execution is requested was rendered in the name of His Majesty the King Abdullah, King of Hashemite Transjordan. Between the latter State and Egypt there is no convention in force concerning the reciprocal enforcement of judgments. The action of the claimant Bank in invoking the Convention of 1929 between Egypt and Palestine is, therefore, erroneous in law. For all the above reasons the request of the claimant Bank is rejected."

[Report: *Revue égyptienne de Droit international* (1951), vol. 7, p. 191.]

NOTE.—The Convention between Egypt and Palestine concerning the enforcement of judgments signed at Cairo on January 12, 1929 (*British and Foreign State Papers* (1929), Part I, vol. 130, p. 292), took the form of an agreement between the "Government" of Palestine and the "Government" of Egypt.

Treaties—Denunciation of—Effect of Denunciation.

See Case No. 31 (*The Maas*).

Treaties—Termination of—Effects on Municipal Law.

See Case No. 94 (*Thurgau* v. *Lang and Legler*).

Treaties—Termination of—As the Result of the Extinction of a State—Subjugation—Capitulation by Germany in 1945.

See Case No. 95 (*Security for Costs (Switzerland) Case*).

XII.—Interpretation of Treaties

i.—Agencies of Interpretation. Construction in Accordance with the Intention of the Parties

Treaties—Interpretation of—Agencies of Interpretation—Aliens—Position of—Confiscation Arising from Commerce with the Enemy—Whether Applicable to Nationals of Neutral States. **Case No. 99**

In re X. AND MRS. X.

France, Conseil d'État. February 3, 1950.

THE FACTS.—French legislation of 1944 and 1945 provided for the confiscation of profits derived from commercial relations with the enemy. The petitioners, who were Swiss nationals, contended that they were not subject to this legislation, on the ground, firstly, that they were nationals of a neutral State, and, secondly, that under a Franco-Swiss Treaty of 1882 they were entitled to "most-favoured nation" treatment, and thus, by application of a Franco-Spanish and a Franco-British Treaty, to exemption from all war levies.

Held : that the contentions of the petitioners must be rejected. The Court said :

"The confiscation of illegal profits derived from commercial relations with the enemy is a levy on the property of the persons concerned, which is both a tax and the payment of reparations to the French community. It cannot be assimilated to a legal penalty. The fines which may be applied by virtue of Article 3 of the Ordinance of 18 October 1944, as amended, supplement the measures of confiscation. Such confiscations and fines may lawfully be imposed on any person who made illegal profits in the circumstances defined by Articles 1 and 3 of the above-mentioned Ordinance, irrespective of whether the fact that he is a national of a neutral State exempts him from the provisions of the Ordinance of 29 March 1945 concerning trade with the enemy.

"The petitioners contend that Article 6 of the Franco-Swiss Treaty of 23 February 1882 concerning the establishment of French nationals in Switzerland and of Swiss nationals in France provides that 'any advantage which one of the contracting parties may have granted or may in the future grant, in any manner whatsoever, to another Power in connection with the establishment of citizens and the exercise of industrial professions shall be applicable in the same manner and at the same time to the other contracting party . . .' and that the benefits of the exemption from 'all war contributions and all extraordinary contributions of whatever nature' granted to

Case No. 99 Contd. Spanish nationals by the Franco-Spanish Consular Convention of 7 January 1862 and to British subjects by Article 11 of the Franco-British Convention of 28 February 1882 must be extended to Swiss nationals resident in France. This argument requires the interpretation of the above-mentioned Conventions. The Conseil d'État is not competent to decide this question. In the absence of special agreement between the Governments concerned, only the Minister of Foreign Affairs is in France competent to determine the meaning and import of the provisions in question. It appears from the interpretation given in a telegram of 6 November 1947 from the Minister of Foreign Affairs to the Minister of Finance that Swiss nationals cannot invoke Article 6 of the Treaty of 23 February 1882 for the purpose of obtaining the exemption granted to Spanish and British nationals."

[Report: *Revue critique de Droit international privé*, vol. 40 (1951), p. 635.]

Case No. 100 **Treaties—Interpretation of—Agencies of Interpretation—The Law of France.**

FRIEDMANN *v.* MINISTÈRE PUBLIC.

France, Court of Cassation (Joint Session of all Divisions). April 27, 1950.

THE FACTS.—The maternal grandfather of the appellants had lost French nationality as a result of the Treaty of Frankfort of 1871 and had become a German national. The paternal ascendants of the appellants were German nationals who had at all times resided in Germany. The appellants claimed to be reinstated in French nationality by virtue of clause 2 of paragraph 1 of Section V of Part II of the Treaty of Versailles, which provided as follows:

> "As from November 11, 1918, the following persons are *ipso facto* reinstated in French nationality:
>
> (2) The legitimate or natural descendants of the persons (who lost French nationality by the application of the Franco-German Treaty of May 10, 1871, and who have not since that date acquired any nationality other than German), with the exception of those whose ascendants in the paternal line include a German who migrated to Alsace-Lorraine after July 15, 1870."

The lower Court held that the appellants were not entitled to reinstatement. It argued that if persons whose paternal ascendants were Germans who migrated to Alsace-Lorraine after 1870 were expressly excluded, *a fortiori* reinstatement could not be claimed by persons whose paternal ascendants were Germans who never migrated to Alsace-Lorraine. The validity of that interpretation of the Treaty of Versailles was the question at issue in the present appeal.

Held : that the appeal must be dismissed. The Court said :

" By telegram of 12 November 1949, addressed to the Minister of Justice, the Minister of Foreign Affairs confirms the interpretation given by the lower Court. He refers, in this connection, to an exchange of correspondence in March 1939 between the authorised representatives of France and Germany, the French part of which figures in the documentary section of the Nationality Code. When, as in the present case, the interpretation of a treaty raises questions of international public policy, the Courts must accept the official interpretation given by the French Government."

[Report : *Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 379.]

Treaties—Interpretation of—Agencies of Interpretation—Treaties Affecting Matters of Public Concern—The Law of France. **Case No. 101**

DE MORINI *v.* ENREGISTREMENT.

France, Tribunal Civil de la Seine. July 7, 1950.

THE FACTS.—In April 1948 the collector of taxes attached monies belonging to the plaintiff, a British national, to cover payments alleged to be due from him in respect of the " impôt de solidarité nationale ". The plaintiff now contested this attachment on the ground that the Franco-British Convention of February 28, 1882, provided that the nationals of the Contracting Parties should be exempt, on the territory of the other party, from all war contributions, and all extraordinary loans floated to meet emergency situations.

Held : that the attachment was lawful and valid. The Court was bound by the interpretation of the Convention given by the French Government. In the view of the Government the exemption provided for in that Convention did not apply to the " impôt de solidarité nationale ". The Court said :

" Taxes are a matter of public interest. Courts have the power to interpret treaties only in so far as they affect private interests. The question whether the Franco-British Convention of 28 February 1882 applies to the ' impôt de solidarité nationale ' must be determined by the French Government. The Court is bound by its interpretation.

" By a letter of 19 September 1946, addressed to the British Embassy in Paris, the Minister of Foreign Affairs stated that the ' impôt de solidarité nationale ' could not be considered to be included in the war contributions and extraordinary loans from which British nationals resident in France were exempt

Case No. 101 *Contd.* by virtue of the Convention of 2 February 1882. The reasons given for that interpretation were that the tax in question was not established for the exclusive benefit of French nationals, but was, like death duties, levied on all property actually or legally situate in France, whatever the nationality of its owners, and was destined to cover public expenditure for the reparation of war damage, in respect of which the British Government had requested the assimilation of its nationals to French subjects.

"In the letter of its ambassador of 18 October 1946, the British Government confined itself to stating that it would not contest the interpretation given by the French Government . . . but that it hoped greater concessions would be granted. . . . In a further letter of 17 January 1949 the ambassador made it clear that his Government had not formally renounced British rights in the matter, but had merely decided not to take any diplomatic action based on the Convention. . . ."

[Report: *Revue critique de Droit international privé,* vol. 39 (1950), p. 394.]

Treaties—Interpretation of—By Reference to Action of the Parties—Effect of the Declarations of Parties Recognizing their Obligation.

See Case No. 16 (*International Status of South-West Africa*).

ii.—Restrictive Interpretation and the Principle of Effectiveness

Case No. 102 **Treaties—Interpretation of—Principle of Effectiveness—Limits of—Settlement of Disputes—Refusal of a Party to Appoint a Commissioner—Power of Secretary-General of the United Nations to Appoint Third Commissioner—Peace Treaties with Bulgaria, Hungary and Roumania.**

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA (SECOND PHASE).

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Winiarski, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo, Judges.)

Advisory Opinion of July 18, 1950.

THE FACTS.—See Case No. 105. The other relevant facts, as stated in the Opinion of the Court, were as follows:

"Having stated, in its Opinion of March 30th, 1950, that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles of the Peace Treaties which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions, and having received information from the Secretary-General of the United Nations that none of those Governments had notified him, within thirty days from the date of the delivery of the Court's Advisory Opinion, of the appointment of its representative to the Treaty Commissions, the Court is now called upon to answer Question III in the Resolution of the General Assembly of October 22nd, 1949, which reads as follows :

> ' III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties ? '

" Articles 36, 40 and 38, respectively, of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties which had not been settled by direct negotiation should be referred to the Three Heads of Mission, continue :

> ' Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.
>
> 2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.'

" The question at issue is whether the provision empowering the Secretary-General to appoint the third member of the Commission applies to the present case, in which one of the parties refuses to appoint its own representative to the Commission."

Held (by eleven votes to two, Judges Read and Azevedo dissenting) : " that, if one party fails to appoint a representative to a Treaty Commission under the Peace Treaties with Bulgaria,

Case No. 102 ***Contd.***

Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, the Secretary-General of the United Nations is not authorized to appoint the third member of the Commission upon the request of the other party to a dispute." (At p. 230.) The Court said :

" Reference has been made for the purpose of justifying the reversal of the normal order of appointment, to the possible advantage that might result, in certain circumstances, from the appointment of a third member before the appointment by the parties of their respective commissioners. Such a change in the normal sequence could only be justified if it were shown by the attitude of the parties that they desired such a reversal in order to facilitate the constitution of the Commissions in accordance with the terms of the Treaties. But such is not the present case. The Governments of Bulgaria, Hungary and Romania have from the beginning denied the very existence of a dispute, and have absolutely refused to take part, in any manner whatever, in the procedure provided for in the disputes clauses of the Treaties. Even after the Court had given its Advisory Opinion of March 30th, 1950, which declared that these three Governments were bound to carry out the provisions of the Peace Treaties for the settlement of disputes, particularly the obligation to appoint their own Commissioners, these Governments have continued to adopt a purely negative attitude.

" In these circumstances, the appointment of a third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission such as the Treaties provide for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only party represented could prevent a Commission so constituted from reaching any decision whatever. Such a Commission could only decide by unanimity, whereas the dispute clause provides that ' the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding '. Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

" In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the provisions of the Treaties. In the present case, the refusal by the Governments of Bulgaria, Hungary and Romania to appoint their own Commissioners has made the constitution of such a Commission impossible and has deprived the appointment of the third member by the Secretary-General of every purpose.

"As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing ; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

"The principle of interpretation expressed in the maxim : *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.

"It has been pointed out that an arbitration commission may make a valid decision although the original number of its members, as fixed by the arbitration agreement, is later reduced by such circumstances as the withdrawal of one of the commissioners. These cases presuppose the initial validity of a commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General in circumstances other than those contemplated in the Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.

"Finally, it has been alleged that a negative answer by the Court to Question III would seriously jeopardize the future of the large number of arbitration clauses which have been drafted on the same model as that which appears in the Peace Treaties with Bulgaria, Hungary and Romania. The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization. An examination of the practice of arbitration shows that, whereas the draftsmen of arbitration conventions have very often taken care to provide for the consequences of the inability of the parties to

Case No. 102 *Contd.*

agree on the appointment of a third member, they have, apart from exceptional cases, refrained from anticipating a refusal by a party to appoint its own commissioner. The few Treaties containing express provisions for such a refusal indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation. In fact, the risk of such a possibility of a refusal is a small one, because normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligations. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision." (At pp. 227–230.)

[Report : *I.C.J. Reports*, 1950, p. 221.]

Note.—Judges Azevedo and Read appended Dissenting Opinions. The Dissenting Opinion of Judge Read develops (at pp. 231–246) in detail the implications of the principle of effectiveness of treaty obligations. The learned Judge said : " It is inconceivable to me that the Allied and Associated Powers would have consented to the setting up of machinery for the settlement of disputes arising out of such important matters which could be rendered ineffective by the sole will of any one of the three Governments concerned, Bulgaria, Hungary and Romania. I am, therefore, inclined at the outset to the view that the Disputes Articles must be interpreted in a manner which will ensure their real effectiveness rather than a manner which would deprive them of all effectiveness." (At p. 231.)

iv.—Consideration of Preparatory Work

Treaties—Interpretation of—Preparatory Work—Ordinary and Natural Meaning of Words.

See Case No. 104 (*Competence of the General Assembly for the Admission of a State to the United Nations*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A—UNITED NATIONS

I.—Legal Position

United Nations—Legal Position of—The Right to Sue—Claim for Damages Resulting from Breach of Contract—Contract Concluded between United Nations and a Member State—Capacity of United Nations to Institute Proceedings in Courts of a Member State—Proceedings against a Private Corporation—Proceedings against a Member State—Sovereign Immunity. **Case No. 103**

BALFOUR, GUTHRIE & CO., LIMITED, *ET AL.* *v.*
UNITED STATES *ET AL.*

United States, District Court for the Northern District of California. May 5, 1950.

THE FACTS.—In an action for damages brought by the United Nations against the United States Government arising out of the loss of and damage to a cargo of milk shipped on behalf of the United Nations' International Children's Emergency Fund on a vessel owned by the United States, the United States Government contended, for reasons set out in detail below, that the courts of the United States were not entitled to exercise jurisdiction.

Held : that the United Nations was one of the international organizations designated by the President of the United States as being entitled to enjoy the privileges conferred by the International Organizations Immunities Act, 1945 (22 U.S.C.A., ss. 288–288 *f*.), and one of these privileges being that of instituting legal proceedings, the objection of the United States Government to the jurisdiction must be overruled and the action allowed to proceed. The Court said :

" The competency of the United Nations to sue the United States in Federal Court under the Suits in Admiralty Act, 46 U.S.C.A. s. 741 *et seq.*, is the principal and unique question tendered by the exceptions to the libel of the United Nations and other joint libelants. As well do the exceptions question the right of the United Nations to maintain the libel against American Pacific Steamship Co., a co-respondent.

Case No. 103 Contd.

" The libel alleges that in the autumn of 1947, the United Nations' International Children's Emergency Fund shipped from the ports of Tacoma and Oakland aboard the s.s. *Abraham Rosenberg* a large quantity of powdered milk destined for Italy and Greece. A portion of the shipment, it is alleged, was never delivered to the consignee and another portion arrived in a damaged condition. The *Abraham Rosenberg* was owned by the United States and was operated under a bareboat charter by respondent American Pacific Steamship Company. The United Nations and six other shippers, whose merchandise allegedly suffered a similar fate, have joined in the libel against the United States and the American Pacific Steamship Company.

" Whether the United Nations may maintain these proceedings against respondent American Pacific Steamship Company can be first and more easily answered.

" The International Court of Justice has held that the United Nations is a legal entity separate and distinct from the member States. While it is not a State nor a super-State, it is an international person, clothed by its Members with the competence necessary to discharge its functions.

" Article 104 of the Charter of the United Nations, 59 Stat. 1053, provides that ' the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes '. As a treaty ratified by the United States, the Charter is part of the supreme law of the land. No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States. But the President has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C.A. ss. 288–288 *f*. Section 2 (*a*) of that Act, 22 U.S.C.A. s. 288 *a* (*a*), states that ' international organizations shall, to the extent consistent with the instrument creating them, possess the capacity—(i) to contract ; (ii) to acquire and dispose of real and personal property ; (iii) to institute legal proceedings '.

" The capacity of the United Nations to maintain the libel against the American Pacific Steamship Company is completely consistent with its charter. The libel asserts rights flowing from a contract made by a specialized agency of the United Nations in the performance of its duties. The agency, the International Children's Emergency Fund, was created by resolution of the General Assembly of the United Nations on December 11, 1946 (Resolution 57 (1), *United Nations Year Book 1946–47*, 162). Its function is to promote child health generally and in particular to assist the governments of countries, that were the victims of aggression, to rehabilitate their children. The solution of international health problems is one of the responsibilities assumed by the United Nations in Article 55 of its Charter, 59 Stat. 1045.

" Whether the United Nations may sue the United States is a more difficult question. It is apparent that Article 104 of the Charter of the United Nations was never intended to provide a method for settling differences between the United Nations and its members. It is equally clear that the International Organizations Immunities Act does not amount to a waiver of the United States' sovereign immunity from suit. The precise question posed is whether the capacity to institute legal proceedings conferred on the United Nations by that Act includes the competence to sue the United States in cases in which the United States has consented to suits by other litigants.[1]

" The broad purpose of the International Organizations Immunities Act was to vitalize the status of international organizations of which the United States is a member and to facilitate their activities. A liberal interpretation of the Act is in harmony with this purpose.

" The considerations which might prompt a restrictive interpretation are not persuasive. It is true that history has recorded few, if any, instances in which international entities have submitted their disputes to the courts of one of the disputing parties. But international organizations on a grand scale are a modern phenomena [*sic*]. The wide variety of activities in which they engage is likely to give rise to claims against their members that can most readily be disposed of in national courts. The present claim is such a claim. No political overtones surround it. No possible embarrassment to the United States in the conduct of its international affairs could result from such a decree as this court might enter. A claim for cargo loss and damage is clearly susceptible of judicial settlement. Particularly is this so in this litigation inasmuch as the United Nations' claim is one of several of the same nature arising out of the same transaction or occurrence.

" International organizations, such as the United Nations and its agencies, of which the United States is a member, are not alien bodies. The interests of the United States are served when the United Nations' interests are protected. A prompt and equitable settlement of any claim it may have against the United States will be the settlement most advantageous to both parties. The courts of the United States afford a most appropriate forum for accomplishing such a settlement.

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[1] Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C.A. s. 742, permits a libel *in personam* to be brought against the United States in respect to United States' vessels employed as merchant vessels " in cases where if such vessel were privately owned or operated " a proceeding in admiralty could be maintained. Section 3 of that Act authorizes the libelant, at his election, to proceed in accordance with the principles of libels *in rem*.

Case No. 103 *Contd.*

" It may be contended that since international organizations are granted immunity from suit by the International Organizations Immunities Act, an equitable and complete judicial settlement of claims asserted against the United States may not be had. But this possible objection is more fancied than real. For the United Nations submits to our courts when it urges its claim and cannot consequently shut off any proper defenses of the United States.

" Finally, it cannot be denied that when the Congress conferred the privileges specified in the International Organizations Immunities Act, it neither explicitly nor implicitly limited the kind or type of legal proceedings that might be instituted by the United Nations. There appears to be no good reason for the judicial imposition of such limitations.

" The exceptions of the respondents are severally overruled."

[Report : 90 F. Supp. 831.]

II.—Membership

Case No. 104

United Nations—Membership of—Admission to—Respective Powers of the General Assembly and Security Council—Power of the General Assembly to Admit to Membership in the Absence of a Recommendation of the Security Council—Preparatory Work—Article 4 (2) of the Charter—Limitations upon the Power of the International Court of Justice to Render Advisory Opinions—Interpretation of the Charter—Alleged Political Character of the Request.

COMPETENCE OF THE GENERAL ASSEMBLY FOR THE ADMISSION OF A STATE TO THE UNITED NATIONS.

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo, Judges.)

Advisory Opinion of March 3, 1950.

THE FACTS.—On November 22, 1949, the General Assembly of the United Nations adopted the following Resolution :

> " *The General Assembly,*
>
> *Keeping in mind* the discussion concerning the admission of new Members in the *Ad Hoc* Political Committee at its fourth regular session,
>
> *Requests* the International Court of Justice to give an advisory opinion on the following question :
>
> ' Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of

the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend ? ' " (At p. 5.)

Held (by 12 votes to 2, Judges Alvarez and Azevedo dissenting) : that " the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend." (At p. 10.)

I. *Power to Render Advisory Opinions.*—(*a*) *Interpretation of the Charter* : " The Request for an Opinion calls upon the Court to interpret Article 4, paragraph 2, of the Charter. Before examining the merits of the question submitted to it, the Court must first consider the objections that have been made to its doing so, either on the ground that it is not competent to interpret the provisions of the Charter, or on the ground of the alleged political character of the question.

" So far as concerns its competence, the Court will simply recall that, in a previous Opinion which dealt with the interpretation of Article 4, paragraph 1, it declared that, according to Article 96 of the Charter and Article 65 of the Statute, it may give an Opinion on any legal question and that there is no provision which prohibits it from exercising, in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function falling within the normal exercise of its judicial powers (*I.C.J. Reports*, 1947–1948, p. 61)." (At p. 6.)

(*b*) *Alleged Political Character of the Request for an Advisory Opinion* : " With regard to the second objection, the Court notes that the General Assembly has requested it to give the legal interpretation of paragraph 2 of Article 4. As the Court stated in the same Opinion, it ' cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision '." (At pp. 6–7.)

II. *Recommendation of the Security Council as an Essential Condition of Admission.*—" It is not the object of the Request to determine how the Security Council should apply the rules governing its voting procedure in regard to admissions or, in particular, that the Court should examine whether the negative vote of a permanent Member is effective to defeat a recommendation which has obtained seven or more votes. The question, as it is formulated, assumed in such a case the nonexistence of a recommendation.

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" The Court is, therefore, called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it.

" Article 4, paragraph 2, is as follows :

> ' The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

" The Court has no doubt as to the meaning of this text. It requires two things to effect admission : a ' recommendation ' of the Security Council and a ' decision ' of the General Assembly. It is in the nature of things that the recommendation should come before the decision. The word ' recommendation ', and the word ' upon ' preceding it, imply the idea that the recommendation is the foundation of the decision to admit, and that the latter rests upon the recommendation. Both these acts are indispensable to form the judgment of the Organization to which the previous paragraph of Article 4 refers. The text under consideration means that the General Assembly can only decide to admit upon the recommendation of the Security Council ; it determines the respective roles of the two organs whose combined action is required before admission can be effected : in other words, the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected." (At pp. 7–8.)

III. *Principles of Interpretation. Natural and Ordinary Meaning of Words. Preparatory Work.*—" In one of the written statements placed before the Court, an attempt was made to attribute to paragraph 2 of Article 4 a different meaning. The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39) :

> ' It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'

" When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*." (At p. 8.)

IV. *The Respective Functions of the General Assembly and the Security Council.*—" The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 24 confers upon it ' primary responsibility for the maintenance of international peace and security ', and the Charter grants it for this purpose certain powers of decision. Under Articles 4, 5 and 6, the Security Council co-operates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organization. It has power, without the concurrence of the General Assembly, to reinstate the Member which was the object of the suspension, in its rights and privileges.

" The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only ' if the Security Council recommends the applicant State for membership ' (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion.

" To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization. It would mean that the Security Council would have merely to study the case, present a report, give advice, and express an opinion. This is not what Article 4, paragraph 2, says.

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" The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, paragraph 2, could treat the absence of a recommendation as equivalent to what is described in that statement as an ' unfavourable recommendation ', upon which the General Assembly could base a decision to admit a State to membership.

" Reference has also been made to a document of the San Francisco Conference, in order to put the possible case of an unfavourable recommendation being voted by the Security Council : such a recommendation has never been made in practice. In the opinion of the Court, Article 4, paragraph 2, envisaged a favourable recommendation of the Security Council and that only. An unfavourable recommendation would not correspond to the provisions of Article 4, paragraph 2.

" While keeping within the limits of a Request which deals with the scope of the powers of the General Assembly, it is enough for the Court to say that nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.

" In consequence, it is impossible to admit that the General Assembly has the power to attribute to a vote of the Security Council the character of a recommendation when the Council itself considers that no such recommendation has been made." (At pp. 8–10.)

[Report : *I.C.J. Reports*, 1950, p. 4.]

III.—Interpretation of Charter

United Nations—Charter of—Chapter XI on Dependent Territories—Puerto Rico and the United States of America.

See Case No. 15 (*Ruiz Alicea* v. *United States*).

United Nations—Charter of—Article 2 (7)—Matters of Domestic Jurisdiction—Power of the International Court of Justice to Render Advisory Opinions.

See Case No. 105 (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*).

PART X

DISPUTES

A—IN GENERAL

Disputes—Settlement of—In General—Determination of the Existence of a Dispute—Dispute Concerning the Fulfilment of Obligations in the Matter of Human Rights—Matters of Domestic Jurisdiction—Article 2 (7) of the Charter—International Court of Justice—Limitations upon the Power to Give Advisory Opinions. **Case No. 105**

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA.

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo, Judges.)

Advisory Opinion of March 30, 1950.

THE FACTS.—Article 2 of the Treaty of Peace of 1947 between certain of the Allied and Associated Powers and Bulgaria provides as follows :

> " Bulgaria shall take all measures necessary to secure to all persons under Bulgarian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting."

Article 36 of that Treaty provides as follows :

> " 1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the

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two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment."

The Treaties of Peace with Hungary and Romania contain identical provisions.

Subsequently it was maintained by certain of the Allied and Associated Powers that Bulgaria, Hungary and Romania had failed to comply with the provisions of these Treaties relating to human rights. They invoked the machinery provided in these treaties for the settlement of disputes arising out of the above-mentioned provisions of these treaties. The Governments of Bulgaria, Romania and Hungary maintained that as they had in fact complied with the provisions of the treaties in question, there was no dispute as to the meaning of these treaties and they declined therefore to appoint representatives to the Commissions provided therein.

On October 22, 1949, the General Assembly of the United Nations adopted a Resolution requesting the International Court of Justice to give an Advisory Opinion in relation to the issues which had thus arisen. The relevant part of the Request was as follows :

> " I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania ?
>
> " In the event of an affirmative reply to question I :
>
> " II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions ?
>
> " In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice :
>
> " III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the

request of the other party to a dispute according to the provisions of the respective Treaties ?

" In the event of an affirmative reply to question III :

" IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute ? "

Held (by eleven votes to three, Judges Winiarski, Zoričić and Krylov dissenting) :

" *On Question I :* that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania ;

" *On Question II :* that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred to in Question I which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions." (At p. 77.)

I. *Advisory Opinions and " Matters of Domestic Jurisdiction ".*—" It is contended that the Request for an Opinion was an action *ultra vires* on the part of the General Assembly because, in dealing with the question of the observance of human rights and fundamental freedoms in the three States mentioned above, it was ' interfering ' or ' intervening ' in matters essentially within the domestic jurisdiction of States. This contention against the exercise by the Court of its advisory function seems thus to be based on the alleged incompetence of the General Assembly itself, an incompetence deduced from Article 2, paragraph 7, of the Charter.

" The terms of the General Assembly's Resolution of October 22nd, 1949, considered as a whole and in its separate parts, show that this argument is based on a misunderstanding. When the vote was taken on this Resolution, the General Assembly was faced with a situation arising out of the charges made by certain Allied and Associated Powers, against the Governments of Bulgaria, Hungary and Romania, of having violated the provisions of the Peace Treaties concerning the observance of human rights and fundamental freedoms. For the purposes of the present Opinion, it suffices to note that the General Assembly justified the adoption of its Resolution by

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stating that ' the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion '.

" The Court is not called upon to deal with the charges brought before the General Assembly since the Questions put to the Court relate neither to the alleged violations of the provisions of the Treaties concerning human rights and fundamental freedoms nor to the interpretation of the articles relating to these matters. The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court.

" These considerations also suffice to dispose of the objection based on the principle of domestic jurisdiction and directed specifically against the competence of the Court, namely, that the Court, as an organ of the United Nations, is bound to observe the provisions of the Charter, including Article 2, paragraph 7.

" The same considerations furnish an answer to the objection that the advisory procedure before the Court would take the place of the procedure instituted by the Peace Treaties for the settlement of disputes. So far from placing an obstacle in the way of the latter procedure, the object of this Request is to facilitate it by seeking information for the General Assembly as to its applicability to the circumstances of the present case.

" It thus appears that these objections to the Court's competence to give the Advisory Opinion which has been requested are ill-founded and cannot be upheld." (At pp. 70–71.)

II. *Advisory Opinions and Non-Participation of Interested States*.—" Another argument that has been invoked against the power of the Court to answer the Questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.

" This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

" The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character : as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it ; the reply of the Court, itself an ' organ of the United Nations ', represents its participation in the activities of the Organization, and, in principle, should not be refused.

" There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an ' organ of the United Nations ', it is essentially the ' principal judicial organ ' of the Organization (Art. 92 of the Charter and Art. 1 of the Statute). It is on account of this character of the Court that its power to answer the present Request for an Opinion has been challenged.

" Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.

" As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes. Furthermore, the settlement of these disputes is entrusted solely to the Commissions provided for by the Peace Treaties. Consequently, it is for these Commissions to decide upon any objections which may be raised to their jurisdiction in respect of any of these disputes, and the present Opinion in no way prejudges the decisions that may be

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taken on those objections. It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.

" It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only ' to the extent to which it [the Court] recognizes them to be applicable '. It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter. In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it. That being the object of the Request, the Court finds in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the Request." (At pp. 71–72.)

III. *The Existence of an International Dispute.*—" Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America, charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.

" This conclusion is not invalidated by the text of Article 36 of the Treaty with Bulgaria (Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania). This article, in referring to ' any dispute ', is couched in general terms. It does not justify limiting the idea of ' the dispute ' to a dispute between the United States of America, the United Kingdom and the Union of Soviet Socialist Republics acting in concert on the one hand, and Bulgaria (Hungary or Romania) on the other. In the present case, a dispute exists between each of the three States—Bulgaria, Hungary and Romania—and each of the Allied and Associated States which sent protests to them.

" The next point to be dealt with is whether the disputes are subject to the provisions of the articles for the settlement of disputes contained in the Peace Treaties. The disputes must be considered to fall within those provisions if they relate to the interpretation or execution of the Treaties, and if no other procedure of settlement is specifically provided elsewhere in the Treaties.

" Inasmuch as the disputes relate to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the Peace Treaties. In particular, certain answers from the Governments accused of violations of the Peace Treaties make use of arguments which clearly involve an interpretation of those Treaties.

" Since no other procedure is specifically provided in any other article of the Treaties, the disputes must be subject to the methods of settlement contained in the articles providing for the settlement of all disputes.

" The Court thus concludes that Question I must be answered in the affirmative." (At pp. 74–75.)

IV. *Obligation to Appoint Representative to an International Commission.*—" In these circumstances, it becomes necessary to take up Question II, which is as follows :

> ' Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions ? '

" Before answering the Question, the Court must determine the scope of the expression ' the provisions of the articles referred to in Question I '. Question I mentions two sets of articles : one set being those articles concerning human rights, namely, Article 2 of the Treaties with Bulgaria and Hungary, and Article 3 of the Treaty with Romania ; the other set being those articles concerning the settlement of disputes, namely, Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The Court considers that the expression ' the provisions of the articles referred to in Question I ' refers only to the articles providing for the settlement of disputes, and does not refer to the articles dealing with human rights.

" This view is clearly borne out by the various considerations stated in the Resolution of the General Assembly of October 22nd, 1949. It is confirmed by the fact that the Questions put to the Court have for their sole object to determine whether the disputes, if they exist, are among those falling under the procedure provided for in the Treaties with

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a view to their settlement by arbitration. The Court does not think that the General Assembly would have asked whether Bulgaria, Hungary and Romania are obligated to carry out the articles concerning human rights. For, in the first place, the three Governments have not denied that they are obligated to carry out these articles. In the second place, the words which precede Question II, ' In the event of an affirmative answer to Question I ', exclude the idea that Question II refers to the articles relating to human rights. There is no reason why the General Assembly should have made the consideration of the question concerning human rights depend on an affirmative answer to a question relating to the existence of disputes. The articles concerning human rights are mentioned in Question I only by way of describing the subject-matter of the diplomatic exchanges between the States concerned.

" The real meaning of Question II, in the opinion of the Court, is this : In view of the disputes which have arisen and which have so far not been settled, are Bulgaria, Hungary and Romania obligated to carry out, respectively, the provisions of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania ?

" The articles for the settlement of disputes provide that any dispute which is not settled by direct diplomatic negotiations shall be referred to the Three Heads of Mission. If not resolved by them within a period of two months, the dispute shall, unless the parties to the dispute agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member, to be selected in accordance with the relevant articles of the Treaties.

" The diplomatic documents presented to the Court show that the United Kingdom and the United States of America on the one hand, and Bulgaria, Hungary and Romania on the other, have not succeeded in settling their disputes by direct negotiations. They further show that these disputes were not resolved by the Heads of Mission within the prescribed period of two months. It is a fact that the parties to the disputes have not agreed upon any other means of settlement. It is also a fact that the United Kingdom and the United States of America, after the expiry of the prescribed period, requested that the disputes should be settled by the Commissions mentioned in the Treaties.

" This situation led the General Assembly to put Question II so as to obtain guidance for its future action.

" The Court finds that all the conditions required for the commencement of the stage of the settlement of disputes by the Commissions have been fulfilled.

" In view of the fact that the Treaties provide that any dispute shall be referred to a Commission ' at the request of either party ', it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose.

" The reply to Question II, as interpreted above, must therefore be in the affirmative." (At pp. 75–77.)

[Report: *I.C.J. Reports*, 1950, p. 65.]

NOTE.—Judges Winiarski, Zoričić and Krylov dissented on the ground that in view of the refusal of the countries concerned to participate in the proceedings the Court could not, having regard to the principle laid down in the Advisory Opinion concerning *Eastern Carelia*, comply with the request to give an Advisory Opinion.

B—INTERNATIONAL COURT OF JUSTICE

I.—Contentious Jurisdiction

International Court of Justice—Procedure of—Interpretation of Judgments of the Court—Conditions for Request for—Article 60 of the Statute. **Case No. 106**

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF NOVEMBER 20, 1950, IN THE ASYLUM CASE.

International Court of Justice.

(Basdevant, Guerrero, Alvarez, Hackworth, Badawi Pasha, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Krylov, Read, Hsu Mo, Azevedo, Judges; MM. Alayza y Paz Soldán and Caicedo Castilla, Judges *ad hoc*.)

Judgment of November 27, 1950.

THE FACTS.—This was a request for the interpretation of the Judgment resolved in the principal *Asylum* case (see Case No. 90). In particular in its request the Government of Colombia requested the Court to answer the following questions:

" *First.*—Must the Judgment of November 20th, 1950, be interpreted in the sense that the qualification made by the Colombian Ambassador of the offence attributed to M. Haya de la Torre, was correct, and that, consequently, it is necessary to attribute legal effect to the above-mentioned qualification, in so far as it has been confirmed by the Court?

" *Second.*—Must the Judgment of November 20th, 1950, be interpreted in the sense that the Government of Peru is not entitled to demand the surrender of the political refugee M. Haya de la Torre, and that, consequently, the Government of Colombia is not

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bound to surrender him even in the event of this surrender being requested ?

" *Third.*—Or, on the contrary, does the Court's decision on the counter-claim of Peru imply that Colombia is bound to surrender the refugee Victor Raul Haya de la Torre to the Peruvian authorities, even if the latter do not so demand, in spite of the fact that he is a political offender and not a common criminal, and that the only convention applicable to the present case does not order the surrender of political offenders ? " (At p. 399.)

Held (by twelve votes to two) : that the request for the interpretation of the previous Judgment was inadmissible. The Court said :

" The request for interpretation now before the Court is based on Article 60 of the Statute which reads as follows :

> ' The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.'

Thus it lays down two conditions for the admissibility of such a request :

(1) The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.

(2) In addition, it is necessary that there should exist a dispute as to the meaning or scope of the judgment.

" To decide whether the first requirement stated above is fulfilled, one must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.

" The three questions raised in this proceeding by the Colombian Government must be considered in the light of this principle.

" The first question concerns the qualification which was in fact made by the Colombian Ambassador at Lima of the offence imputed to the refugee. It seeks to obtain from the Court a declaration that this qualification was correct and that legal effect should be attributed to it. The Court finds that this point was not raised in the submissions of the Colombian Government in the proceedings leading up to the Judgment of November 20th, 1950. In those submissions, the Court was asked to pronounce only on the claim expressed in abstract and general terms, that Colombia, as the country granting asylum, was competent to qualify the offence by a unilateral and final decision binding on Peru.

" The circumstance that, before the proceedings in Court in the principal case, the qualification which was in fact made by the Colombian Ambassador had given rise to discussions between the two Governments through a diplomatic correspondence is irrelevant. As regards that part of the counter-claim of the Peruvian Government which was based on a violation of Article 1, paragraph 1, of the Havana Convention of 1928, it is to be noted that, in order to decide this question, it was sufficient for the Court to examine whether the Peruvian Government had proved that Haya de la Torre was accused of common crimes prior to the granting of asylum, namely, January 3rd, 1949. The Court found that this had not been proved by the Peruvian Government. The Court did not decide any other question on this point.

" Questions 2 and 3 are submitted as alternatives, and may be dealt with together. Both concern the surrender of the refugee to the Peruvian Government and the possible obligations resulting in this connexion, for Colombia, from the Judgment of November 20th, 1950. The Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so. It was for the Parties to present their respective claims on this point. The Court finds that they did nothing of the kind.

" The ' gaps ' which the Colombian Government claims to have discovered in the Court's Judgment in reality are new questions, which cannot be decided by means of interpretation. Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions.

" In reality, the object of the questions submitted by the Colombian Government is to obtain, by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer.

" Article 60 of the Statute provides, moreover, that interpretation may be asked only if there is a ' dispute as to the meaning or scope of the judgment '. Obviously, one cannot treat as a dispute, in the sense of that provision, the mere fact that one Party finds the judgment obscure when the other considers it to be perfectly clear. A dispute requires a divergence of views between the parties on definite points; Article 79, paragraph 2, of the Rules, confirms this condition by stating that the application for interpretation ' shall specify the precise point or points in dispute '.

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" It is evident that this condition does not exist in the present case. Not only has the existence of a dispute between the Parties not been brought to the attention of the Court, but the very date of the Colombian Government's request for interpretation shows that such a dispute could not possibly have arisen in any way whatever.

" The Court thus finds that the requirements of Article 60 of the Statute and of Article 79, paragraph 2, of the Rules of Court, have not been satisfied." (At pp. 401–403.)

[Report : *I.C.J. Reports*, 1950, p. 395.]

International Court of Justice—Jurisdiction of—Succession to Jurisdiction of the Permanent Court of International Justice.

See Case No. 16 (*International Status of South-West Africa*).

International Court of Justice—Procedure—Counter-claims.

See Case No. 90 (*Asylum Case* (*Colombia/Peru*)).

II.—Advisory Jurisdiction

International Court of Justice—Advisory Jurisdiction—Refusal of Interested States to Participate in the Proceedings.

See Case No. 102 (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*Second Phase*)).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Meaning of—Exclusion of " Molest " (War Risks) in Fire Insurance Policy—Declaration of War—Acts of War—Meaning of—Acts by Members of Resistance Movement—The Law of Holland. **Case No. 107**

Amstel Insurance Co. Ltd. *v.* Van der Wal.

Holland, District Court of Zwolle. March 29, 1950.

The Facts.—During the occupation of Holland a haystack, the property of a farmer whose farm was insured against fire, was set alight, probably by order of the underground resistance movement in order to hinder the Occupant. Since the insurance policy contained a clause excluding fires caused in consequence of hostilities, the Insurance Company refused to indemnify the owner, offering evidence to prove exactly how the fire had started.

Held : that the Insurance Company must be allowed to prove the cause of the fire since, if its version of the facts were confirmed, its liability would be excluded by the clause " free from molest ". The Court said :

" The insurance policy contained an enumeration of the contingencies covered by the term ' molest ' [hostilities or warlike operations], *viz.*, armed violence, seizure, privateering, robbery, arrest by the authorities, revolt, civil war, declaration of war, and reprisals. This enumeration was apparently taken from the legal definition of ' molest ' in Article 647 of the Dutch Commercial Code, from which it differed only on some minor points. It was therefore important to examine what that Article implied by the term ' molest '. It merely reproduced Article 350 of the French *Code de Commerce* of 1807, which in turn had borrowed its enumeration of the risks covered by ' molest ' from Book III, title 6, Article 26, of the French *Ordonnance de la Marine* of 1681. This derivation of the legal definition threw a clearer light on the real meaning of some of the items enumerated. Thus the term ' declaration of war ' comprised not only loss or damage incurred by the

Case No. 107 Contd.

insured as a result of such a declaration, but all war risks. Although in 1807 experience had already shown that a state of war could arise without a previous declaration of war, the term was simply copied in that year from the *Ordonnance de la Marine*, which was issued at a time when it was still generally accepted that such a declaration was an indispensable condition for the commencement of a war. An insurer who intended to exclude liability for war risks used to insert the clause ' franc d'hostilité '. This clause was the origin of the expression ' free from molest ',[1] which occurred in later laws and insurance policies, and which excluded from the risks covered by the insurance all damage which was a normal consequence of war. During this long development the term ' molest ' had always remained identical with war damage, and the various contingencies listed under that term, such as armed violence, were covered only when they arose as the result of a state of war. In contradistinction, however, to earlier periods in history, in which the belligerents strove to confine the war to combat between soldiers and with military weapons, today economic, political and cultural warfare has, especially in the Second World War, begun to play an important part side by side with purely military measures. In this total war the civilian population takes an increasing part, active as well as passive, alongside the national armed forces. This total war was continued after the capitulation of the Netherlands on May 15, 1940. The Netherlands Government in London instigated the population of occupied Holland to resist and oppose the Occupant by all the means at their disposal, and that population, both individually and as an organised resistance movement, responded to the appeal. Thus the concept of ' acts of war ' no longer remains confined to acts committed by members of the armed forces as such, but its scope has been extended to, *e.g.*, such acts as setting fire to hayricks by underground workers on the orders of the leaders of the resistance movement, as a means of inflicting damage on the enemy. Even if this particular act of arson should not be held to be a genuine act of war, it would nevertheless be possible to consider the damage as having been caused by the then existing state of war between the former German Reich and Holland, since such damage might, in the circumstances described above, be deemed a consequence which could reasonably be expected to result from total war."

[Report : *N.J.*, 1950, No. 406.]

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[1] *Anglice* : " free from consequences of hostilities or warlike operations " (Arnould, *Marine Insurance*, 13th ed. (1950), p. 905).

Existence of State of War—Municipal Ruling thereon—Whether Conclusively Binding on Prize Court—Non-Recognition of Opposing Belligerent as a State—Effect of Non-Recognition on Belligerency—Recognition by Other States—Non-Recognition of Israel by Egypt. **Case No. 108**

The Fjeld.

Egypt, Prize Court of Alexandria. November 4, 1950.

The Facts.—On May 19, 1948, the Shipping Inspection Service of Alexandria caused 102 cargoes to be discharged from the *Fjeld* and decided to seize them. This seizure was approved by the local military governor of the Zone of Alexandria. Subsequently the military Governor-General decided to release one of the cargoes, and on October 23, 1948, ordered that the relevant documentation be transmitted to the Prize Court so that they might rule upon the residue of the cargo.

The firm of Javoularidis and Company appeared as agent of " The Hellenic Lines ", who had chartered the ship, claiming an indemnity for delay (demurrage) and other dues connected with the unloading. Nineteen other companies appeared claiming the release of the cargo seized. On behalf of the claimants it was argued that the procedure followed in the matter of inspection was null and void, on the ground that the *Fjeld* had completed discharging the cargo, and had requested, on May 13, 1948, permission from the Customs authorities to leave port. The authorities did not grant such permission until May 15, 1948, the day when a state of siege was declared in Egypt and the day when Egyptian forces entered Palestine in order to engage the Israeli forces. Military Proclamation No. 5 established a shipping inspection service in the ports of Alexandria, Port Said and Suez, and the Egyptian authorities accordingly proceeded to the inspection of the *Fjeld* and caused the cargo to be discharged in pursuance of the abovementioned Proclamation. It was maintained, on behalf of the claimants, that this was done at a time when the procedure for inspection had not yet been established (such procedure was established by Proclamation No. 13 of 17 May). It was argued that the procedure followed for inspection was null and void, having been carried out at a time when no state of war existed.

Held : that the objections raised by the claimants must be overruled. The Court said :

" On 15 May 1948 the Egyptian Government informed the Security Council that orders had been given to the Egyptian Army to enter Palestine for the purpose of establishing peace and order and for the purpose of putting an end to acts of violence committed by Zionists in that country. Also an

Case No. 108 ***Contd.***

ultimatum was broadcast to the Zionists and copies of it were dropped by aircraft upon Tel Aviv. At midnight, the Egyptian troops crossed the frontier, and, for their part, the Zionists proclaimed the State of Israel which was immediately recognized by the United States and by Russia.

" The Egyptian Government on 15 May 1948 proclaimed a state of siege and, in virtue of this emergency situation, issued Proclamation Number 5 setting up a shipping inspection service in the ports of Alexandria, Port Said and Suez. Article 3 of this Proclamation provides that every ship, before entering one of these ports, must submit to an examination under the conditions laid down by Proclamation Number 13 according to which the agent of the Customs Administration is authorized to take note of the manifest of goods shipped and to ascertain the nature of such goods so as to satisfy himself that they do not include munitions, whether directly or indirectly, for institutions or persons residing in Palestine.

" According to the same proclamation, if such merchandise was discovered, it was to be treated in accordance with the rules established by public international law, and was subject to confiscation by the appropriate authority. On 6 June 1948, a notice issued by the military Governor-General declared that the provisions of Proclamation No. 13 concerning the inspection of ships in Egyptian ports applied also to goods exported from Palestine, whatever the nature of their destination, and whether of Palestinian origin or not. On 28 June 1948, the military Governor-General issued another notice in which he enumerated articles of contraband and distinguished between those which should be confiscated and those which should not. Article 3 of Proclamation No. 38 of July 1948 (which sets up a Prize Court) provides that the Court shall apply the rules of public international law, and, in their absence, that it should decide in accordance with the principles of equity. The said Article classifies as contraband any cargo, of whatsoever kind, shipped directly or indirectly to institutions or persons in Palestine, if such cargo is of assistance to the war effort of the Zionist forces in Palestine. Article 23 of Law Number 32 of 1950 provides that ' cases actually pending before the Prize Court set up by Proclamation No. 38 of 1948, and the amending proclamations, shall be set down for hearing after the entry into force of this law so that they may be examined in conformity with its provisions '. Article 4 of Law No. 32 of 1950 provides : ' in the matter of contraband captured before the entry into force of the present law, the Prize Court shall take into account all directions issued by the appropriate authority under emergency powers '.

" It follows from what has been said above that the Egyptian legislation governing the Prize Court—whether it is extraordinary military legislation or ordinary legislation—

deals with the question of the existence of a state of war and with the application of the laws of war. The existence of a state of war or of neutrality in so far as non-belligerents are concerned cannot be discussed by the Prize Court, for it is the duty of the Court to apply the law without examining its legality.

" The Court will, nevertheless, consider from a purely academic point of view the argument of the claimant in order to see whether the principles laid down in Egyptian legislation are or are not in conformity with the principles of the public international law of war.

" The claimant maintains that the hostile operations which took place before 15 May, between the Zionist armed bands and the Arabs could not confer upon either the status of belligerents so as to give them legal power to seize cargoes shipped to an enemy destination, for, according to the principles of public international law, one cannot recognize as belligerents individuals composing a State on the one hand and a group of pirates or armed bands on the other, even if the latter appear to be organized in the form of a State. It was also argued that after 15 May, there did not exist a state of war giving the Egyptian Government the right to take measures permitted under international law; for that Government has not recognized the Zionist State, and its intervention in Palestine had no other end in view than to suppress the revolution and subdue the Zionist rebels.

" This contention makes it necessary to examine the political status of Palestine, both before the Mandate and after the Mandate was established.

" The Treaty of Versailles recognized for Palestine a diminished international personality and placed it under " A " Mandate. This Mandate gave to Great Britain no rights of sovereignty over the territory. Indeed the inhabitants had a nationality distinct from British nationality. When the League of Nations disappeared, the Mandate also disappeared, which led the United Kingdom to declare the end of the Mandate on 15 May 1948 and to withdraw its troops. After the withdrawal of the Mandatory Power, there was a political and military vacuum which both the Arabs and the Zionists attempted to fill by force of arms to their respective advantage. Hostilities broke out between them. In truth, 15 May did not constitute the beginning of military operations but the beginning of the end of such operations. On 27 November 1947, the General Assembly of the United Nations, as successor of the League, approved the partition of Palestine into two States, one Arab and the other Jewish. The Arab League recognized the existence of a Palestinian Arab State and included it amongst its members and allies.

" It is clear that the Palestinian conflict had begun some time before 15 May 1948 and that the Palestinian Arabs and States of the Arab League actively participated therein. It is common knowledge that this attitude was capable of becoming official at any moment and certainly not later than the day when the British Mandate came to an end. The Mandate had scarcely terminated when the States of the Arab League lost no time in intervening in Palestine and in associating themselves with the Palestinian Arabs.

" According to the accepted doctrine of international law, when two or more States are associated together for the purpose of fighting a common enemy and when they are united by engagements with the object of realizing the common aim, one cannot speak of several wars merely because several States are involved ; there is only one war in relation to all the combatants ; it is sufficient for one State to participate in the conflict as an ally of one of the belligerents in order to entitle it to seize and capture articles of contraband preventing them from reaching the common enemy, even if such articles have been shipped before the Allied State participated itself in the conflict.

" Egypt, in her capacity of member of the Arab League and ally of members of the League, found herself in a state of war with the Zionists, before 15 May 1948. The carriage of contraband is a hostile act against an associate and ally of Egypt, and also against the group of States which are fighting Zionism in Palestine.

" The shipping companies who are sending their vessels to Jewish ports are not unaware of these facts. Indeed, Tavoularidis and Company have produced, amongst other documents, four bills of lading relating to four cargoes seized on the ship and shipped from Algiers on 13 April 1948 for Tel Aviv. Beneath the printed clauses of the bill of lading were some typed clauses forbidding the discharge of the cargo at Jaffa or at any Lebanese or Egyptian ports. This clause proved clearly the intention that the cargo was destined for the Zionists, and was not to fall into Arab hands. It also proved that the owners of the cargo were well aware of the armed conflict then raging.

" The contention of the claimant is that the non-recognition of the State of Israel by Egypt means that Egypt has no right to take any measures of seizure so far as the Zionists are concerned. This is contradicted by the facts. Not only has the State of Israel been admitted to the United Nations but also on 15 May, the United States of America and Russia recognized the new State. Such recognition was unqualified and conferred upon Israel the capacity to proceed according to the laws of war, to seizures and to taking in prize so far as her enemies were concerned. The exercise of such rights by Israel against Egypt and the group of Arab States gives, no doubt, a corresponding right to Egypt to exercise the same rights against Israel. The non-recognition by Egypt of Israel as a State cannot prevent Israel from being regarded as a belligerent. Nothing in international law requires that the status of belligerency should be expressly proclaimed ; such a status can result from the circumstances. The Egyptian Government, by creating a Prize Court governed by the principles of international law, and by applying the rules of war in so far as concerns the treatment of prisoners and wounded and so far as concerns the conduct of hostilities, has clearly shown its desire to follow the rules laid down by international law in the Palestinian conflict.

" It now remains to decide the consequences of the conflict in so far as neutrals are concerned It is established that the Palestinian conflict constitutes, from the legal point of view, a true war with international aspects. This imposes upon neutrals the duties resulting from neutrality and requires them to submit to the rights of the belligerents, whether or not such neutrals have officially proclaimed their neutrality, for neutrality is only one of the consequences of a state of war, and subjects neutrals, by reason only of their knowledge of such a state, to the action of the belligerents. It has been said : ' A neutral Power cannot plead as defence the absence of notification if it was in fact aware of the existence of hostilities '.[1]

" The claimant well knew of the existence of a state of hostilities, and Egypt had a complete right to proceed to measures of seizure as laid down by Proclamation 5 of 15 May 1948.

" For these reasons, the Court rejects the objections raised by the claimant."

[Report : *Revue égyptienne de Droit international* (1951), vol. 7, p. 151.]

IV.—Belligerent Forces

War—Combatant Forces—Resistance Movement—Acts of War. **Case No. 109**

MARISSAL *v.* MUTUELLE GÉNÉRALE FRANÇAISE ACCIDENTS.

France, Court of Cassation, Civil Division. April 22, 1950.

THE FACTS.—This was a claim for sums due on a policy on the life of one Dr. Marissal, who was killed in May 1944. The policy provided that the case of death resulting from " acts of war " was not covered by it. The Court of Appeal of Montpellier, in a judgment of June 17, 1947, found that Dr. Marissal had been killed by a person who had, since 1940, been a member of the resistance movement, that before being placed in command of a resistance group that person had been asked to demonstrate his courage by killing a member of the militia, that he chose to kill Dr. Marissal whose name figured by error on a list of members of the militia, and that Dr. Marissal's death was, accordingly, the result of an act of war. This was an appeal from that decision.

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[1] No source is given in the judgment for this quotation.

Held : that the appeal must be rejected. The Court said :

" From the facts found by it the lower Court could justifiably deduce that the act in question, inspired as it was by the desire to serve the country by thwarting the enemy and his supporters, and by the exigencies of the fight against the invader, must be regarded as an act of war. The 'war clause' of Article 34 of the Law of 13 July 1930 and of insurance policies reproducing its terms does not apply only to battles and to the risks of fighting, but comes into operation whenever there is a link of cause and effect between the injury and an act relating to operations of a foreign war."

[Report : *Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 577.]

NOTE.—See, to the same effect, *Cie d'Assurances La Tutélaire* v. *Olivero* (*ibid.*), decided by the same Court on January 4, 1950, where the Court *held* that the lower Court had been wrong in concluding that a murder could not be considered to be an act of war in the absence of hostilities in the region. See, on the other hand, the decision of the same Court, of the same date, in the case of *Cie d'Assurances La Participation* v. *Veyròn* (*ibid.*), where it was *held* that a murder committed several months after the liberation of the region by individuals acting on their own initiative did not constitute an act of war, whatever their motives. Similarly, the Court of Appeal of Agen held, on January 6, 1950, in the case of *Cie d'Assurances La Paternelle-Vie* v. *Mellec* (*ibid.*, 1951, *Sommaires*, p. 21), that the execution of a collaborator on the order of a military tribunal of the Resistance after the liberation could not be regarded as an act of war, since it did not have any connection with the offensive action of the forces of a belligerent, and did not constitute an act of defence against the enemy forces.

Case No. 110

War—Belligerent Forces—Partisan Formations—Relation to Regular Forces—Right to Effect Requisitions—Rules of Warfare on Land—Application of—The Law of Italy.

In *Varrone* v. *S.U.R.C.I.S.*, decided on January 14, 1950, by the Court of First Instance of Cuneo (Italy), it was *held* that the command of partisan formations had the same powers of requisitioning as the command of regular armed forces. The Court said :

"This point does not require a discussion, for it emerges reasonably clearly from the literature and was unequivocally decided on several occasions by the courts in the light of principles laid down by the Supreme Court. It is sufficient to refer to the Decree of the Lieutenant of the Realm of 28 February 1945 No. 73, which recognized the two partisan organisations known as the C.V.L. and the C.L.N., and delegated to them the powers of the State in the territories occupied by the enemy. This recognition was confirmed by all subsequent legislation in this field. The Decree is of a declaratory, and not of a constitutive nature, seeing that it takes official cognizance of the existence for some time past of volunteer organizations. It recognizes that these formations possessed the requisite qualifications envisaged in Hague Convention IV and in Article 25 of our Law of War [1] and were to be regarded as lawful belligerents for the purposes of international law as well as of Italian municipal law. They were thus on an equal footing with the regular Italian armed forces. This equal treatment applies in every respect, subject to the adaptation of the rules of the law of war to the special peculiarities of clandestine warfare. Consequently, the powers of the command of partisan forces in matters of requisitioning are at least identical with those of the command of the regular army."

[Report: *Foro Italiano*, 75 (1950), I, 946.]

NOTE.—See *Baffico* v. *Calleri*, *Annual Digest*, 1948, Case No. 128. And see De Nova in *Temi*, 1948, p. 291.

See also *Lidonici* v. *Bentivegna*, decided on June 9, 1950, where the Court of First Instance of Rome held that no damages could be recovered from the defendants, members of partisan formations, who were responsible for the attack upon German units in the Via Rasella,[2] seeing that this attack was an act of warfare according to Italian municipal law, even if it could not be so regarded from the point of view of international law. As regards the latter question, the Court said:

"The plaintiff contends, in the first place, that the incident in the Via Rasella cannot be regarded as a lawful act of warfare, seeing that the persons who carried it out were not lawful belligerents. If this were correct, it would be necessary to treat as unlawful every resistance movement and thus also all activities of partisans which were the most active signs of resistance in Italy and elsewhere. It must not be overlooked that partisan warfare flourished among the nations which suffered under German occupation, where it constituted a spontaneous reaction of the population against the daily excesses of the occupants. These had transformed the occupied territory into a theatre of operations where it was not always possible to organize and employ a body of volunteers of sufficient force to oppose the enemy openly, as happens in wars conducted by regular armies. In most cases partisan activities had to take place in the

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[1] The Court referred to the Law of July 8, 1938, no. 1415.

[2] See *In re Kappler*, *Annual Digest*, 1948, Case No. 151.

Case No. 110 *Contd.* strictest secrecy. In these conditions it was impossible to operate with an organized force, having a responsible superior, a uniform or a distinctive sign capable of being recognized at a distance, and carrying arms openly, as the law of war demands. Nevertheless, if partisan activities must be judged in the light of the international law of war, they cannot be regarded as illegal merely for the reason that they are contrary to the Hague Convention of 18 October 1907 which determines the conditions for recognizing lawful belligerents, and which are set out above. In the sense and within the limits of this Convention it may be possible to deny to combatant partisans the character of lawful belligerents. In fact, the Germans never treated them as such. . . ." [Reports: *Foro Italiano*, 73 (1950), I, 926; *Giurisprudenza Italiana*, 102 (1950), I, 2. 577.]

Case No. 111 **War—Belligerent Forces—Partisan Formations—Relation to Regular Forces—" Act of War " in Insurance Policy—Rules of Warfare on Land—The Law of Italy.**

In *Beccarini* v. *Società La Sicurtà*, decided on January 19, 1950, by the Italian Court of Cassation, it was *held* that the activities of the Italian partisans during the period from 1943 until 1945 constituted acts of war for the purpose of the exemption provided in Article 1912 of the Italian Civil Code in favour of insurers against accidents, whereby the latter were relieved from liability in the case of accidents caused by events arising from war. The Court said:

" The view cannot be accepted that guerilla and partisan warfare as it occurred, above all, during the last world war, in many countries of Europe and particularly in Italy, falls outside the concept of ' war ' in the meaning and for the purposes of Article 1912 which concerns contracts of insurance. War being an armed conflict between peoples, it is a phenomenon which cannot be defined closely. It changes necessarily with the times, the localities and the circumstances. To-day it is no longer exclusively a contest between two armies arrayed in the field, as it used to be in times past. Instead it includes every activity of the warring States to an extent that one may well speak of total war. War assumes, and is practically forced to assume, a special form if a State is occupied by the enemy, either wholly or in part, and if the population of the territory which has been seized but not yet conquered does not submit to the domination of the invader. In these circumstances organized resistance arises, employing means which are sometimes effective and sometimes not. In any event it is necessarily clandestine, given the disproportionate strength of the forces opposing each other. It is an underground war consisting of ambushes, assaults, sabotage and acts of terrorism. In other words, it is guerilla warfare, a term which is specifically intended to indicate limited acts of local warfare which are based principally upon ingenuity and upon a perfect knowledge of the district. The purpose of these acts is to weaken from inside the military organization and the moral resistance of the enemy. It would be wrong to deny that such acts have the character of acts of warfare for the sole reason that no organised army in the true sense is in existence or that no formal declaration of war was made. Many examples exist in the history of the last centuries which lead to the assimilation and uniform treatment, having regard to the actual conditions, of the concepts of war and guerilla warfare, in so far as their means, their forms and their purposes are concerned. Consequently, it is not possible to exclude guerilla warfare when interpreting legislative provisions which refer expressly to war only.

" In particular, war and guerilla warfare must be treated on an equal footing where the so-called partisan warfare is involved, which was organized in Italy, and especially in Northern Italy, during the years of German occupation in the last stage of the recent world war (1943–1945). . . . Nobody who has lived in Italy during those years . . . can fail to recognize, whatever his point of view, and notwithstanding the fact that many excesses were committed, that the clandestine struggle inside Italy against the German invader was a complex operation of warfare in the true sense. It must be admitted that it was executed in the form proper to guerilla warfare, but it was carried out in conjunction with the command of the Italian regular forces and of that of the Allies. Its purpose was to undermine the power of resistance of the enemy and to contribute, as indeed it did effectively, to the final military victory. Moreover, on 8 September 1943, the lawful Government of Italy issued a formal declaration of war against Germany and against the forces of the *de facto* Government of the so-called Republic of Salo, which supported the Germans. . . ."

[Reports: *Foro Italiano*, 73 (1950), I, 412, with a note; *Giurisprudenza Italiana*, 102 (1950), I, 1, 181.]

NOTE.—See also *Saporiti* v. *S.A. Infortuni Milano*, decided on August 13, 1947, by the Court of First Instance of Milan [Reports: *Foro Italiano*, 71 (1948), I, 552; *Giurisprudenza Italiana*, 100 (1948), I, 2, 382; *Annual Digest*, 1948, Case No. 130] reversed on June 25, 1948, by the Court of Appeal of Milan. [Report: *Foro Italiano*, 71 (1948), I, 1132.]

Belligerent Parties—Effect of Non-Recognition of One Belligerent as a State—Non-Recognition of Israel by Egypt.

See Case No. 108 (*The Fjeld*).

Belligerent Forces—Resistance Movements—Status of.

See Case No. 144 (*In re Haase*).

Armed Forces—Members of—Reserve Officers—Whether Entitled to be Treated as Prisoners of War.

See Case No. 127 (*In re Siebers*).

V.—Effects of Outbreak of War

i.—In General

War—Effects of—Enemy Character of Vessel—Conclusiveness of Enemy Flag.

See Case No. 120 (*The Unitas*).

ii.—On Treaties

Case No. 112 **War—Effects of Outbreak of—Multilateral Treaties—Convention of Mannheim of 1868 concerning Navigation on the Rhine—Denunciation by Germany in 1936—Whether Suspended during War or Continued in Operation between Belligerents—Revival after Cessation of Hostilities—Occupation Régime in Germany—Article 43 of the Hague Regulations.**

THE *GOLDEN RIVER v.* THE *WILHELMINA*.

Holland, District Court of Rotterdam. December 29, 1950.

THE FACTS.—In June 1947 a collision occurred between two Dutch vessels on the Rhine in Germany near the border between the French and American Occupation Zones. The owner of one of the vessels, the *Golden River*, sued the owner of the other, the *Wilhelmina*, for damages in the Dutch District Court of Rotterdam. The defendant demurred to the jurisdiction of the Dutch courts on the ground that the Shipping Tribunals set up by the Convention of Mannheim of 1868 were alone competent to take cognizance of the case. The defendant further argued that the District Court had no jurisdiction to decide the question whether or not the Convention had ceased to operate either through its denunciation by Germany in 1936 or as the result of Germany's war of aggression against Holland in 1940, or, in the alternative, that it could only judge the case in the light of the Netherlands Law of April 4, 1869, which had transformed the Mannheim Convention into Netherlands law and which had never been repealed.

Held: in the first place, that the Court had jurisdiction to decide the question whether the Convention of Mannheim had continued to be, or was again, binding as between the Netherlands and Germany, and secondly, that it was so binding. The Court therefore had no jurisdiction to take cognizance of the merits of the claim. The provisions of the Convention of Mannheim of 1868 (as revised by the Treaty of Versailles in 1919) did not become binding on the Dutch courts by reason of the fact that it was approved by the Netherlands Parliament in the form of a law. It was binding because the States parties to the Convention, including the Netherlands, after approval by Parliament and ratification by the King, had shown their will to regulate navigation on the Rhine according to, on the one hand, the Convention of Mannheim of 1868, and, on the other hand, the relevant Articles of the Treaty of Versailles to which (subject to certain reservations not presently relevant) the Netherlands acceded by means of a special Protocol signed at Paris on January 21, 1921. It was therefore the Conventions themselves, and not the authorization to ratify them given to the King by Parliament . . . which must be applied by Dutch courts. It follows from that that since the origin and the cessation of international obligations arising from treaties are governed by customary international law and since the Netherlands courts are competent and therefore obliged to apply that law also, those courts must independently judge the question if and how far the provisions of the Convention of Mannheim apply to a particular case. A multilateral treaty such as the Revised Convention of Mannheim, which was not concluded in contemplation of war, was indeed suspended as between Holland and Germany as from May 1940, but only in so far and as long as its provisions had in fact become inapplicable. The concept of factual inapplicability must be interpreted restrictively and must, therefore, be limited to the period during which it was impossible to apply the provisions of the Convention properly. Such impossibility clearly existed between May 10, 1940, and midnight of May 8–9, 1945, when the unconditional surrender of Germany put an end to armed combat. In the opinion of the Court that impossibility had continued to exist during the period necessary to consolidate the surrender of Germany and to bring some order into the chaos which had ensued as a result of the fighting in Europe. The Governments concerned having, however, since the autumn of 1945 effected the restoration of the Rhine, within the framework of the Mannheim Convention, as a highway for the transport of goods and persons not directly connected with the war, this factual inapplicability of the multilateral Convention had terminated. As a result, the Convention had revived. To achieve this result no peace treaty between Holland and Germany was needed. Such a treaty would only put an end

Case No. 112 *Contd.*

to a legal status obtaining between the two countries. Without such a treaty situations might nevertheless develop which would permit and bring about the revival of treaties formerly concluded by Holland not only with Germany herself but at the same time also with other States. As far as international navigation on the Rhine was concerned, situations existed at the time of the commencement of these proceedings which justified the conclusion that the Convention had then revived.

Even if the Occupying Allied Powers were bound, after May 1945, by Article 43 of the Hague Regulations of 1907, they could not be required to continue such a violation of international law as the denunciation and the rendering inoperative by Germany in 1936 of the Convention of Mannheim, so that those Powers had the right, even under Article 43, to restore public life in the matter of attribution of jurisdiction in civil matters to the Shipping Tribunals with regard to navigation on the Rhine.

[Report: *N.J.*, 1951, No. 79.]

Case No. 113

War—Effects of—On Multilateral Treaties—Revised Union Convention for the Protection of Industrial Property, 1883.

In re HOLZWARTH GASTURBINEN A.G.

Holland, Patent Office (Appellate Division).

November 14, 1950.

THE FACTS.—By a contract made in 1929 between the Swiss company Holzwarth Gasturbinen A.G. and its German subsidiary Holzwarth Gasturbinen G.m.b.H., the latter acquired for Germany all the rights of the Swiss company. Pursuant to this contract it submitted to the German Patent Office on May 7, 1943, an application for a patent. In 1950 the Swiss company made a corresponding application for the Netherlands to the Dutch Patent Office, invoking a right of priority on the basis of the previous application for Germany. The question was raised whether Germany was to be considered as having been in 1943 a "Union country" *vis-à-vis* the Netherlands, despite the existence of a state of war between the two countries.

Held: that Germany must be deemed to have remained a member of the International Union for the Protection of Industrial Property. This Union is composed of those States on which the Revised Union Convention of Paris of 1883 is binding. Prior to the outbreak of the Second World War Germany was one of these States. The Paris Convention had remained operative between Germany and Holland notwithstanding the outbreak of the war because of its nature as well as of the presumed will of the Contracting Parties. (See the judgment of the Supreme Court of April 2, 1948, in *Re Utermöhlen*: *N.J.*, 1948, No. 442; *Annual Digest*, 1949, Case No. 120.) During the war the Dutch courts and administration had continued to apply the Convention in favour of German nationals as the German courts and administration had applied it in favour of Netherlands subjects. Hence it followed that Germany must be deemed still to have been a member of the Union in 1943.

[Report: *N.J.*, 1951, No. 186, with a note.]

NOTE.—See also the judgment of the Cantonal Court of The Hague in the *Guardianship (Holland) Case* (*N.J.*, 1950, No. 501), holding that the Hague Convention of 1902 concerning Conflicts of Laws in Matters of Guardianship remained in force between Holland and Germany despite the war. On the subject generally see A. de la Pradelle, " The Effect of War on Private Law Treaties ", in *International Law Quarterly*, 1948-1949, pp. 555-576, and G. Scelle, " De l'influence de l'état de guerre sur le droit conventionnel (à propos d'un récent arrêt de cassation)", in *Clunet*, 77 (1950), pp. 26-84. And see *Lovera* v. *Rinaldi*, decided by the French Court of Cassation on June 22, 1949: *Recueil Sirey*, 1949, I, p. 161, with a note by Niboyet; *Annual Digest*, 1949, Case No. 130.

War—Effect on Treaties—Hague Convention on Civil Procedure, 1905—*Cautio judicatum solvi*—Binding Effect of Convention as between Czechoslovakia and Holland—Question of Extinction of Czechoslovak Republic in 1939. **Case No. 114**

VALK *v.* KOKES.

Holland, District Court of Rotterdam. October 28, 1949.

Court of Appeal of The Hague. October 27, 1950.

THE FACTS.—In an action by Kokes, a Czechoslovak national, against Valk, a Dutchman, the defendant applied for an order that the plaintiff deposit security for costs. Kokes resisted the application, relying on the Hague Convention on Civil Procedure of 1905, to which Czechoslovakia had acceded in 1926. Valk contended in reply that the former Republic of Czechoslovakia had ceased to exist before the outbreak of the Second World War and that therefore treaties concluded by that Republic had lapsed. There was, moreover, no evidence that the new State of Czechoslovakia had after the war acceded to the Convention or taken over obligations resulting from it. The District Court rejected the application for security, holding that the Convention was still in force. The defendant appealed.

Held (by the Appellate Court): that the appeal must fail. The first ground of appeal was that the Court below had regarded the events which occurred in Czechoslovakia in 1938

Case No. 114 *Contd.*

as fundamental changes brought about by German action in the internal structure of the former Czechoslovak State, which changes had been nullified after the disintegration of the German Reich when the lawful Czechoslovak Government was reinstated in the exercise of its former authority. According to the appellant, the true construction of the events of 1938 was that the Czechoslovak State which had adhered to the Convention in 1926 had ceased to exist when, under the pressure of warlike threats, it had submitted to the German Reich and had been dismembered into two parts, a Czech part, which, under the title of the Protectorate of Bohemia-Moravia, was annexed to the German Reich, and a Slovak part which was formed into a new independent republic. The Court held that this construction was ill-founded. It appeared clearly from the arguments of the parties, taken together with certain letters from the Foreign Office produced to the Court, that the actual course of events had been as follows: Shortly after the Czechoslovak Republic yielded to the Germans the Allied Powers had protested against its partition and incorporation. The overthrow of the State had caused the flight to Allied countries of numbers of citizens of the Republic, including many who had held leading positions in the State. At the end of 1939 or the beginning of 1940 a National Committee was set up in London, under the leadership of Dr. Beneš, with the object of defending the national interests of the Republic and ensuring the legal continuation of the Czechoslovak State. Shortly afterwards, this Committee and its Declaration of Intentions were officially recognized by the Allied Governments. On August 25, 1941, the Netherlands Government accorded full recognition to the Committee as the Czechoslovak Government. The Committee remained active for the execution of the aims of the Government, and after the war the Czechoslovak State resumed its place in the ranks of sovereign States. From all this it followed that the contention of the appellant that the pre-war Czechoslovak State ceased to exist must be rejected. Nor did the circumstance that the Czechoslovak Government had been prevented by violence from exercising its authority in its own territory result in any change in its international relations resulting from existing treaties.

The second ground of appeal was that the Court below had paid no attention to the argument that there was nothing to show that the Czechoslovak State under its present political régime was prepared to take over formerly existing treaty and other obligations. There was the additional factor that Netherlands subjects who went to Czechoslovakia rendered themselves liable to arrest or disappearance and that the Netherlands State was not able to give diplomatic and consular protection or assistance to such subjects. These arguments, said the Court of Appeal, must also be rejected. A convention is an agreement between two or more States, and the Convention in question provides that it shall remain in force until formally denounced. Neither of the States concerned has yet denounced the Convention, which therefore remains in force between them. Whatever may be the position as regards the treatment of Netherlands subjects in Czechoslovak territory, action thereon is left to the discretion of the Netherlands Government, which alone is competent to decide whether any given incident is sufficient reason for denouncing the Convention.

[Report : *N.J.*, 1951, No. 353.]

iv.—On Enemy Subjects with regard to—

(*a*) THEIR PERSONAL STATUS IN THE TERRITORY OF THE BELLIGERENT.

Enemy Aliens—Position of—Persons Assimilated to Enemy Aliens.

See Case No. 68 (*Pessis* v. *Widow Grandjean and Others*).

(*b*) PROPERTY OF ENEMY ALIENS

War—Effect of—Upon Property of Resident Enemy Alien—Vesting of Property in Alien Property Custodian—Subsequent Naturalization of Enemy Alien—Claim to Return of Property—The Law of the United States of America. **Case No. 115**

SCHILL *v.* MCGRATH.

United States, District Court, Southern District of New York.
February 20, 1950.

THE FACTS.—The plaintiff, a German national, was resident in the United States, and in June 1942, when the United States were at war with Germany, certain property belonging to the plaintiff and situate in the United States was vested in the Alien Property Custodian. In January 1949, the plaintiff became a naturalized American citizen, and in October of the same year he instituted the present proceedings in which he claimed the return of the property previously vested in the Custodian. The defendant, the Attorney-General of the United States, in answer to the plaintiff's claim, relied on section 39 of the Trading With the Enemy Act (re-enacted as section 12 of the War Claims Act, 1948) which provides that

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"no property . . . of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941 . . . shall be returned to former owners thereof. . . ." On behalf of the plaintiff it was contended that section 39 of the Trading With the Enemy Act did not preclude those persons from claiming the return of their property who, although they were German (or Japanese) citizens at the time when their property vested in the Custodian, had become naturalized American citizens before the date on which they instituted proceedings for the return of their property.

Held : that section 39 of the Trading With the Enemy Act must be construed strictly ; that those who were German nationals at the time when their property vested in the Custodian were not entitled to claim the return thereof ; that, consequently, the plaintiff's claim must be dismissed.[1] The Court said :

" Section 39, enacted as Section 12 of the War Claims Act of 1948, provides that : ' No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. . . . Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act. . . .'

" This Section clearly states that if the property or interest vested by the Alien Property Custodian belonged to a national of Germany or Japan at the time it was vested, it may not be returned, and suit for the return of such property or interest cannot be brought pursuant to Section 9 of the Act.

" Plaintiff was a citizen of Germany at the time the property in question was validly vested, and as such he was a ' national ' of Germany as that term is used in the Act. *Bellman* v. *Clark*, D.C., Civ. No. 47–229, S.D.N.Y., November 8, 1948 ; *Miyuki Okiahara* v. *Clark*, D.C. Hawaii 1947, 71 F. Supp. 319 ; see H.R. 976, 80th Cong., 1st Sess., pp. 2–3 ; Executive Order 8389, Section 5E (i), 5 F.R. 1400 (1940), as amended by Executive Order 8785, 6 F.R. 2897 (1941), 12 U.S.C.A. s. 95*a* note.

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[1] In *Guessefeldt* v. *McGrath et Al.* (89 F. Supp. 344) the United States District Court for the District of Columbia dismissed an action by a German national, who had not become a naturalized American citizen, for the return of property previously owned by him in Hawaii and subsequently vested in the Alien Property Custodian. The plaintiff in that case had been a resident of Hawaii from 1896 until 1938 when he went to Germany, intending to return after a temporary sojourn in that country. In fact, he was unable to return until July 1949, when he instituted proceedings for the return of his property.

" These facts are admitted by the plaintiff and the only matter in dispute on defendant's motion is the interpretation of Section 39 ; therefore this is a proper case for consideration upon a motion for summary judgment. See *Colby* v. *Klune*, 2 Cir., 178 F. 2d 872.

" There have been no cases construing Section 39, and if the Section could in any way be considered ambiguous, the only aid to construction would be the legislative history of the Section. Since different interpretations of the Section have been advanced by the plaintiff and the defendant, respectively, an examination of the Congressional background of the bill by which the Section was enacted should resolve the issue.

" In the hearings on the bill held before a Senate Judiciary subcommittee, numerous witnesses objected to the bill on the ground that it did not distinguish between loyal and disloyal enemy aliens, but instead precluded all from recovering vested property by judicial proceedings. See Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 80th Cong., 2d Sess., on H.R. 4044, pp. 197–198, 233–236, 254–255 (hereafter designated as ' Hearings '). One witness suggested that if confiscation of alien property is to take place, ' proper provision for the return of the property to that class of aliens as we designate as friendly ones should be made ' (p. 255). Another witness proposed an amendment which would have limited Section 39 so that it would not apply to German or Japanese nationals residing outside of enemy-occupied territory unless they aided or abetted enemies of the United States (p. 235). None of these alternative proposals was adopted.

" The bill had previously been unanimously reported by the House Committee on Interstate and Foreign Commerce, H.R. 976, 80th Cong., 1st Sess. (1947). Section 39 was given serious consideration by the House of Representatives in a discussion on the floor on January 26, 1948 (94 Cong. Rec. I, pp. 550–573), and it was recognized that many perfectly innocent people would, under the bill, lose their all (p. 551), and that recourse could only be had to Section 32 of the Trading With the Enemy Act for the return of property taken from friendly aliens living in the United States (p. 552).

" It is therefore clear that Section 39 was intended to apply to *all* German or Japanese nationals living in the United States, and counsel for the plaintiff does not disagree with this conclusion. Counsel does urge, however, that Section 39 was not intended to foreclose those who are now American citizens but were not such at the time the property vested, and that plaintiff is in this category since he was naturalized in January 1949. This contention is based on several statements, made in the course of the Hearings and debate on the bill, to the effect that Section 39 is designed to preclude the return of German

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enemy assets to German ownership and control. See H.R. 976, *supra*, p. 2; Hearings, *supra*, p. 111; 94 Cong. Rec. I, *supra*, p. 551.

" Though this may be one of the bases of Section 39, there is nothing in the legislative history to indicate that Section 39 was not intended to bar return of property to former German owners who subsequently obtained American citizenship. Section 39 is directed at property rather than claimants, and it is the status of the property when vested rather than the status of the claimant at the time of suit which is controlling.

" If Congress had intended the bar to be applicable only to present nationals of Japan or Germany, it could have used appropriate language to obtain that result. However, the clear language used in Section 39 makes no exception in the case of one now a citizen of the United States. Since the Section is applicable to friendly aliens, there is no logical reason why it should not be applicable to those who have had the good fortune to become United States citizens.

" No suit under Section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of vesting, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to Section 9 or 32 (*a*). Section 33. Even if plaintiff were correct in his interpretation of Section 39, there would still be a serious question in this case as to whether plaintiff is barred by Section 33. However, we will assume for the purpose of his argument as to the interpretation of Section 39 that he is not so barred. The plaintiff urges that those German nationals who do become naturalized have a right to bring suit under Section 9 for the return of their property. Yet the time limitation applies, and only those who fortuitously become naturalized before the expiration of the permissible period stated in Section 33 could institute an action during that period. If plaintiff's contention is correct, the right to bring suit would be dependent on the speed of the Naturalization Service, and in all likelihood only those who filed their naturalization petitions before the war, as did plaintiff, would be eligible to bring suit. Furthermore Section 39 applies to nationals of Japan as well as Germany, and it is common knowledge that persons of the Japanese race are ineligible for United States citizenship. 8 U.S.C.A. s. 703; *Morrison* v. *People of State of California*, 1934, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664. Therefore the implied amendment which plaintiff desires this Court to read into Section 39 would be as follows: ' Provided, however, that this section shall not apply to German nationals who are naturalized as United States citizens within the period in which suit can be brought under section 9 of this Act, as designated in section 33 hereof '.

" Surely such a provision cannot be implied where it does not exist. The Section as enacted has clarity and force and does not contain any modifications or exceptions.

" It should be noted that Congress was not unaware of the problem of the rights of citizens of the United States, and that in the debate on Section 39 a member of the House Committee on Interstate and Foreign Commerce mentioned that the Committee was considering a bill (H.R. 4903) which would broaden the scope of those eligible to get their property back under the Trading With the Enemy Act by amending Section 32 so that ' citizen of the United States ' would in effect include ' an individual who at any time after December 7, 1941, and prior to the expiration of the time during which return may be properly made under this Act has been or is deemed to be a citizen of the United States." 94 Cong. Rec. I, *supra*, p. 553.

" The policy behind the enactment of Section 39 as stated by the House Committee, H.R. 976, pp. 2–3, is as follows: ' The policy of nonreturn and noncompensation is a sound public policy which should be enacted into law. It does not violate any concepts of international law or international morality. No essential difference exists between private property and public property in the case of Germany and Japan. For several years before World War II, while Germany and Japan were preparing to make war upon the United States, property owned in the United States by the citizens of both of these countries was subject to rigid control of their respective governments. While the fiction of private ownership was retained, actually property of German and Japanese nationals in the United States was widely used to accomplish the national objectives of those countries.'

" It was thought that the enemy government had the duty to reimburse its nationals for loss due to its own action in waging war (94 Cong. Rec. I, *supra*, pp. 551, 556, 564 ; Hearings, *supra*, p. 22), and that it was morally proper for the United States Government to take the property of enemy nationals and apply it to the legitimate claims of American nationals. 94 Cong. Rec. I, *supra*, p. 564 ; Hearings, *supra*, p. 101. The view of the Justice Department on the bill was that the property, having vested, is the property of the United States and ' that the *former owners* of such property have no claim for its return '. (Emphasis added.) 94 Cong. Rec. I, *supra*, p. 571.

" Section 39 might be considered harsh, and innocent persons may suffer because of it. Indeed, it has even been suggested by one Representative that the bill could be characterized as ' legalized robbery '. 94 Cong. Rec. I, *supra*, p. 551. The Government, however, has the right under the war power clause of the Constitution, Art. 1, Sect. 8, Cl. 11,

Case No. 115 Contd. to confiscate property of a national of an enemy nation, and this right is not limited by the due process or just compensation clause. See Hearings, *supra*, pp. 19–20; *Silesian-American Corp.* v. *Clark*, 1947, 332 U.S. 469, 475, 68 S.Ct. 179, 92 L.Ed. 81; *Cummings* v. *Deutsche Bank*, 1937, 300 U.S. 115, 120, 57 S.Ct. 359, 81 L.Ed. 545; *United States* v. *Chemical Foundation*, 1926, 272 U.S. 1, 11, 47 S.Ct. 1, 71 L.Ed. 131; *Miller* v. *United States*, 1870, 78 U.S. 268, 11 Wall. 268, 20 L.Ed. 135. This Court cannot subscribe to the theory advanced by plaintiff that the clear and unambiguous language of Section 39 should be supplemented by judicial legislation.

" This does not mean that friendly nationals of Germany or Japan are barred from all relief under the Trading With the Enemy Act. There still remains the authority of the Alien Property Custodian to grant administrative relief as provided by Section 32, which authority was specifically preserved in Section 39. See 94 Cong. Rec. I, *supra*, p. 552. However, the right of return under Section 32 is administrative and discretionary, and there is no right to review the judgment of the administrative authorities under this Section. *McGrath* v. *Zander*, D.C. Cir., 1949, 177 F. 2d 649.

" Accordingly, suit to enforce the claim of plaintiff is barred by Section 39 of the Trading With the Enemy Act and defendant's motion for summary judgment is granted and the complaint dismissed. Plaintiff's motion for summary judgment is denied."

[Report: 89 F. Supp. 339.]

Case No. 116 **War—Effects of—Property of Enemy Aliens—Vesting of Property in Custodian—Debenture Bonds—Whether Evidence of Obligation or the Obligation Itself—Bonds Situate in Foreign Country—Jurisdiction of Courts—The Law of the United States of America.**

McGRATH, ATTORNEY-GENERAL *v.* CITIES SERVICE CO. *ET AL.*

United States, District Court for the Southern District of New York. October 24, 1950.

THE FACTS.—The defendants, a corporation incorporated in the United States, had issued certain debenture bearer bonds, two of which were owned by a person who was an enemy alien within the meaning of the United States Trading with the Enemy Act. By a vesting order of March 11, 1949, " the debt or other obligation . . . evidenced by the bonds . . ." was vested in the Attorney-General of the United States, as successor to the Alien Property Custodian. In an action brought by the Attorney-General to enforce his rights under the vesting order it was found as a fact that on the date when the vesting order was made the bonds were in the possession of the occupying authorities in the Soviet sector of Berlin, and that they continued to be in their possession. The defendants contended that as the bonds were not " within the United States " as provided in the Trading with the Enemy Act, the vesting order was incapable of vesting any rights in the Attorney-General. The latter, on the other hand, while admitting that the bonds themselves were not within or subject to the jurisdiction of the United States, contended that the debt which they represented must be distinguished from the bonds themselves, and the debt being within the United States, he was entitled to succeed.

Held : (i) That the bonds were documents embodying rights, and that the State which had jurisdiction over the documents also had jurisdiction over the rights ;

(ii) That as the bonds were not within the jurisdiction of the United States when the vesting was made, the defendants were entitled to succeed. The Court said :

" Each party moves either for judgment on the pleadings or for summary judgment. There appears to be no issue between the parties as to any material fact.

" Vesting Order 12960, executed March 11, 1949, vested in the Attorney General as successor to the Alien Property Custodian as ' property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, Adline von Campenhausen ' an enemy alien.

" ' *a.* That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights of redemption, and,

" ' *b.* That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond.'

" On January 5, 1950, after some previous correspondence, the Office of Alien Property authorized and directed defendant Cities Service Company to cancel bonds M 23293 and M 23318 and to issue to the Attorney General in lieu thereof its check representing the proceeds of redemption with accrued interest. These two bonds had been called for redemption prior to the issuance of the Vesting Order. Cities Service Company was also authorized and directed to cancel bond M 7029 and to issue to the Attorney General a new bond of the same series

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for the same face value and having affixed thereto the number of coupons corresponding to the unredeemed coupons affixed to M 7029, or, alternatively, to issue a check for the redemption price and accrued interest. This bond matures in 1969.

" This action was brought January 30, 1950, to enforce the above demands. Defendant Chase National Bank is the present trustee under the indentures under which the bonds were issued.

" The parties have stipulated that no claim is to be made with regard to M 23293 because it was paid prior to the issuance of the Vesting Order. M 7029 was presented for redemption in New York by Fiduciary Trust Company of New York on behalf of Globe and Rutgers Fire Insurance Company on January 5, 1950. It was not redeemed. A notation of the issuance of the Vesting Order was made on the debenture and it was then returned to Fiduciary Trust Company. It is now apparently in the possession of a New York brokerage firm. The parties have stipulated that ' The present whereabouts of Debenture No. M 23318, last reported in Berlin, are unknown. In response to an official inquiry from the Branch Office of the Office of Alien Property in Germany, the Deutsche Bank, located in the Soviet Sector of Berlin, by letter dated May 19, 1949, advised that . . . M 23293, M 23318 and M 7029 had been seized and transferred by the local occupying authorities and that, therefore, the debentures were not at present at their disposal. . . . Information in the possession of the Government indicates that the Debentures had been held in the Russian Sector of Berlin prior to the issuance of Vesting Order No. 12960 and that the seizure by the occupying authorities occurred prior to the issuance of the Vesting Order.'

" The Trading with the Enemy Act, s. 5 (*b*) (1), 50 U.S.C.A. Appendix, s. 5 (*b*) (1), authorizes the vesting of alien property ' subject to the jurisdiction of the United States '. Executive Order 9095, s. 2 (*c*), as amended, 50 U.S.C.A. Appendix, s. 6 note, issued by authority of the Trading with the Enemy Act, authorizes the Alien Property Custodian to vest property ' within the United States '. The Government does not contend that the certificates were within or subject to the jurisdiction of the United States. Its position, as indicated by the Order's description of the property sought to be vested, is that the certificates are to be distinguished from the ' debt or other obligation ' and that, though the certificates were abroad, the ' debt or other obligation ' was within or subject to the jurisdiction of the United States and so could be vested.

" The question whether in these circumstances there existed at the time of the issuance of the Vesting Order a ' debt or other obligation ' within or subject to the jurisdiction of the United States turns on the nature of these negotiable bearer bonds.

" ' Bonds have never been considered only as evidences of obligation ; from the earliest times they have been treated as the very obligations, and that notion persists.'

" The Restatement of Conflict of Law s. 52, comment *a* declares : ' A negotiable instrument is a document embodying a right ; and the state which has jurisdiction of the document has jurisdiction of the right.' The illustration thereunder seems precisely in point here : ' A negotiable promissory note for the payment of $100 is made in state X by A, payable in the same state to B. B indorses the note to a bank, which holds it in its vaults in State Y. The obligation embodied in the note is subject to the jurisdiction of Y.' Under this principle it would seem clear that the ' debt or other obligation ' sought to be reached by the Vesting Order was not within o subject to the jurisdiction of the United States.

" The United States Treasury Department takes the same view in the analogous problem of taxation of estates of non-resident aliens. Regulation 105, s. 81.50 provides : ' Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein.'

" The Trading with the Enemy Act and Executive Order 9095 purport to be concerned not with all property anywhere, but only with property ' subject to the jurisdiction of the United States ' or ' within the United States '. Vesting Order 12960 attempts to reach a ' debt or other obligation ' which is not within or subject to the jurisdiction of the United States. It is, therefore, without the authority of the Executive Order and the Act, and consequently the defendants must have summary judgment."

[Report : 93 F. Supp. 408.]

War—Effects of—Enemy Property—Disposal by Custodian of Enemy Property—Disposal Allegedly Contrary to Treaty—Absence of Direct Incorporation of the Treaty as Part of Municipal Law.

See Case No. 1 (*Republic of Italy* v. *Hambros Bank, Ltd.*).

War—Effect of—On Private Enemy Property—Powers of Executive Department.

See Case No. 129 (*Merck Chemical Company* v. *National Government*).

vi.—Neutral Persons and Property

War—Effect of—On Property of Neutral Nationals—Legality of Confiscation by Belligerent.

See Case No. 99 (*In re X. and Mrs. X.*).

vii.—Trading with the Enemy

Trading with the Enemy—Vesting Orders—Effects of Changes of Sovereignty.

See Case No. 28 (*Diamond* v. (1) *Minister of Finance.* (2) *Custodian of Enemy Property*).

VI.—Enemy Character

i.—Of Individuals

Case No. 117 **War—Enemy Character—Of Persons—Enemy Territory—Different Meanings of—Limitation of Actions—Maritime Conventions Act, 1911—Limitation (Enemies and War Prisoners) Act, 1945—Trading with the Enemy Act, 1939.**

SOCIÉTÉ DUNKERQUOISE DE REMORQUAGE ET DE SAUVETAGE *v.* OWNERS OF THE SHIP *ATLANTIC SCOUT*, HER CARGO AND FREIGHT.

THE ATLANTIC SCOUT.

England, High Court (*Probate, Divorce and Admiralty Division*). (Willmer J.)

May 10, 1950.

THE FACTS.—On February 24, 1950, the plaintiffs, a French company, issued a writ against the owners of an English vessel claiming remuneration for salvage services rendered to that vessel in January 1940. In June 1940 France was occupied by the enemy and it had become illegal for the salvors to take proceedings against the owners of the vessel. Apart from any question arising out of the state of war from 1939 to 1945, the period allowed by the Maritime Conventions Act, 1911, for bringing an action was two years, subject to the right of the court to extend the time in special circumstances. By the Limitation (Enemies and War Prisoners) Act, 1945, that period was deemed not to run from the time when a necessary party to an action was an enemy or was detained in enemy territory until he ceased to be so, and for twelve months afterwards. On October 13, 1944, His Majesty's Government recognized the Government of France established under General de Gaulle; and by S. R. & O. 1945, No. 346—removing, as regards France, restrictions imposed by s. 1 of the Trading with the Enemy Act, 1939—the right of French subjects to sue in the courts of this country was restored. From the date of the salvage services to the date of the issue of the writ a period of about ten years had in fact elapsed; and the shipowners now contended that the action was not maintainable because statute-barred, and that the writ should be set aside. The French salvors, on the other hand, contended that the remainder of the statutory period had not yet begun to run against them, because no certificate by the Board of Trade declaring that France had ceased to be enemy territory had yet been issued; and that such a certificate was required by S. R. & O. No. 1034 of 1943, made under the Defence (Trading with the Enemy) Regulations, 1940.

Held: that the Limitation (Enemies and War Prisoners) Act, 1945, had created a new definition of the term "enemy territory" for the purposes of that Act; in the absence of the necessary certificate of the Board of Trade declaring that France had ceased to be "enemy territory" in this sense, she remained enemy territory; therefore the period of limitation had not yet begun again to run against the plaintiffs, and their writ could not be set aside even though France was not any longer enemy territory either at common law or under the Trading with the Enemy Act, 1939.

Per Willmer J.: "The question turns on the true construction of the Limitation (Enemies and War Prisoners) Act, 1945, on which the plaintiffs rely. Section 1, sub-s. 1, is the operative provision." [His Lordship read it.]

"On behalf of the salvors it is contended that on the occupation of France by the German forces the period provided for by the Maritime Conventions Act, 1911, ceased to run against them, and it is said that for certain technical reasons time has not yet begun to run again against them. If that is right, then clearly this action cannot be halted *in limine*. Moreover, even after the moment when time will begin to run again, the salvors, according to that argument, will still have a further period of something like a year and seven months to run before it can be said that the action is statute-barred.

"It is argued that the salvors are, for the purposes of the Act of 1945, an enemy,—that is to say, for the purpose of preventing the running of time they still continue to be technically an enemy. That contention must depend on the definition of 'enemy' which is contained in the statute itself. Section 2 refers to the definition contained in the Trading with the

Case No. 117 *Contd.*

Enemy Act, 1939, but adds these significant words : '. . . except that in ascertaining whether a person is such an enemy the expression "enemy territory" in s. 2 of the said Act' (the Act of 1939) 'shall have the meaning assigned to that expression by this section'.

"Therefore I must turn to the Act of 1939 to see what the definition of 'enemy' is. It is in s. 2, which includes four classes of persons as 'enemies', two of which are material for present purposes : '(*b*) any individual resident in enemy territory', and (*c*) 'any body of persons (whether corporate or incorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy'. An affidavit before me shows that the salvors are a body corporate, controlled by persons who are resident in France.

"The question, therefore, arises : is France 'enemy territory' within the meaning of the Act of 1945, which, as already pointed out, creates a new definition of 'enemy territory', and specifies that in determining the meaning of 'enemy' that new definition of 'enemy territory' has to be taken into consideration. By s. 2, sub-s. 1 (*c*), of the Act of 1945, 'enemy territory' means 'any area which, by virtue of reg. 6 or reg. 7 of the Defence (Trading with the Enemy) Regulations, 1940, or any order made thereunder, is treated for any of the purposes of the said Act as enemy territory as so defined'.

"I have been referred to an Order No. 1034 of 1943, which is an Order in Council amending the Defence (Trading with the Enemy) Regulations, 1940." [His Lordship read Art. 6 (1) of the Order of 1943, and continued :]

"It is not disputed that the Board of Trade have never by Order specified the cessation of that provision, although cessation orders have in practice been made in the case of a number of other European countries ; and I was shown examples of typical orders which have been made. The information before me is, however, that no such cessation order has ever been made in respect of the Republic of France. It appears to me, therefore, that the effect of that regulation, when taken into consideration in relation to the definition of 'enemy territory' contained in the Act of 1945, leads inevitably to the conclusion that, for some purposes, France remains 'enemy territory' within the meaning of the Act of 1945.

"If that is so, then the salvors' contention seems unavoidable, that, so long as that state of affairs persists, time is not running against them. It was submitted by counsel for the shipowners that that highly technical argument will not do, because the salvors are not entitled to come to this court and allege for one purpose that they are 'enemies' while pretending for other purposes that they are not 'enemies'. If, counsel says, the salvors are ' enemies ', they have no business to be suing in His Majesty's courts at all, and the argument presented on their behalf ought not to be entertained. That contention is very attractive, because, as counsel points out, the object of the legislature in enacting the Limitation (Enemies and War Prisoners) Act, 1945, was to protect persons who, for one reason or another on account of the war, *e.g.*, by becoming enemies or by being detained by enemies, were unable to prosecute their rights during the continuance of that disability. But it is suggested that the moment an ex-enemy, or a person who was detained by enemies, or any person who is covered by the Act of 1945, recovers the ability to prosecute his claim in these courts the whole reason for his protection disappears. On that ground counsel for the shipowners claims that the salvors cannot be heard to say that for one purpose they are ' enemies ' and for another that they are not.

" Attractive as that argument is, I do not see my way to accept it, for this reason : the salvors have, in fact, a perfectly good legal right now, in 1950, to sue in this court. They are no longer ' enemies ' at common law, whatever their position may have been during the war ; nor do they commit any offence against the Trading with the Enemy Act, 1939, by instituting proceedings in this court : their right to do so was restored by St. R. & O. 1945, No. 346. That Order, so far as France is concerned, removed the restrictions imposed by s. 1 of the Trading with the Enemy Act, 1939, and, as I see it, from that time onwards a Frenchman was entitled to sue in the courts of this country. So far as I know, there is now no reason, either at common law or by statutory enactment, why a citizen of France should not prosecute any claim which he has in the courts of this country. I cannot, therefore, accept the contentions urged on behalf of the shipowners.

" The result seems to be very surprising, for the present plaintiffs are placed in a specially privileged position. Unlike other claimants, they appear to enjoy the right to bring an action in these courts at any time, now or in the future, without any question of time running against them being allowed to arise—and, if that conclusion is right, that state of affairs will apparently continue for a period even after the moment when the running of time again begins.

" In these circumstances, it appears to me that it is impossible to say that the writ in this action should be set aside or that any order should be made halting the proceedings *in limine*. The motion on behalf of the defendants must therefore fail."

[Reports : L.R. [1950] P. 266 ; 84 Ll. L. Rep. 22 ; 94 S.J. 438.]

Case No. 118 **Enemy Character—Of Individuals—Enemy Character of Wife Resident in Enemy Territory—Non-Enemy Domicile of Husband—Whether Wife's Residence or Husband's Domicile Decisive—The Law of the United States of America.**

KAKU NAGANO *v.* CLARK, ATTORNEY-GENERAL.

United States, District Court of the Northern District of Illinois. March 16, 1950.

THE FACTS.—The plaintiff, who owned certain property in the United States, had been resident in Japan for many years, and she was so resident while Japan was at war with the United States. She and her husband were Japanese citizens, but the husband had remained domiciled in the United States throughout the period when the plaintiff was resident in Japan. In 1943, while the war between Japan and the United States was in progress, the plaintiff's property in the United States was vested in the Alien Property Custodian, on the ground that the plaintiff was an "enemy" within the meaning of the Trading with the Enemy Act. The property having subsequently been transferred to the Attorney-General, the defendant in the present case, the plaintiff brought an action for its return. It was contended on her behalf, *inter alia*, that notwithstanding that she had resided in enemy territory at the material time, she must in law be regarded as having had her husband's American domicile, which would preclude her being considered an "enemy" within the meaning of the Act. On behalf of the Attorney-General, who moved for the dismissal of the action, it was contended that residence in enemy territory was sufficient to constitute a married woman an enemy within the meaning of the Act and that the domicile of her husband was immaterial.

Held : that, irrespective of her husband's domicile, the plaintiff, being resident in Japan, was an enemy within the meaning of the Trading with the Enemy Act and accordingly was not entitled to the return of her property, and that the action must be dismissed. The Court said :

"This is a companion case to *Shinsaku Nagano* v. *Clark*, D.C., 85 F. Supp. 368, in which this court held that Shinsaku Nagano, husband of the plaintiff herein, could not recover 8780 shares of stock in the Fuji Trading Company which on the books of the corporation had stood in the name of Kaku Nagano, a Japanese national living in Japan, and which had been vested by the Alien Property Custodian in 1943 as the property of a national of a designated enemy country. In the present case, Kaku Nagano brings suit under Section 9 (*a*) of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, s. 9 (*a*), to recover these shares.

" The defendant has moved for judgment dismissing the complaint with prejudice on the ground that the plaintiff, as a ' resident within ' Japan since 1924, except for a visit to the United States in 1932–33, is an enemy as defined in Section 2 of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, s. 2, and hence may not maintain an action under Section 9 (*a*) of the Act to establish her right, title and interest in said shares of stock ; and that the plaintiff, as a Japanese national, is among the class of persons whose property the President has authorized to be vested and she is therefore sufficiently tainted by enemy associations to be barred, under *Clark* v. *Uebersee Finanz-Korporation*, 1947, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88, from maintaining this suit.

" The plaintiff's opposition to the present motion is based on several grounds. First, plaintiff contends that she should not properly be regarded as an ' enemy ' under Section 2 of the Act because, despite her long stay in Japan, her domicile remained in the United States with her husband. She alleges that her long stay in Japan was not really voluntary but was required by the family necessity of giving her three children a Japanese education and of arranging marriages in the Japanese tradition for her two daughters, who had been born in Japan and hence were not citizens of the United States. Second, plaintiff argues that the vesting of the property involved here was wholly outside the purposes of the Act, since it bore no relation to the ability of this country or of the enemy to wage war.

" With respect to the first ground of her argument, plaintiff contends that enemy nationality and physical presence are only indicia of enemy character, and that since the decision in *Clark* v. *Uebersee Finanz-Korporation*, 1947, 322 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88, held that the Government could show the enemy taint attaching to apparently neutral interests, it follows that one who meets the statutory definition of an enemy may show the lack of any real enemy taint. This argument is a *non-sequitur* and, as I read the *Uebersee* decision, it directly refutes this argument. In that case, the Supreme Court said that the definitions in Section 2 of the Trading with the Enemy Act are ' merely illustrative '. 322 U.S. at pages 488–489, 68 S.Ct. 174. Thus it appears clear to me that the meaning of the *Uebersee* case in this regard is that although the Government may show facts indicating an enemy taint not strictly within the definition of ' enemy ' in Section 2, facts bringing a party squarely within the statutory definition may not be disregarded. Next, I think that the facts of this case bring the plaintiff squarely within the statutory definition of ' enemy ', her long residence in Japan making her a ' resident within ' the territory of an enemy nation, regardless of the possibility that her domicile remained at all times in the

United States, where her husband presumably had his domicile. Although it has been held that for one to be 'resident within' enemy territory, something more than mere physical presence is required, *Josephberg* v. *Markham*, 2 Cir., 1945, 152 F. 2d 644, I do not think that the alleged family necessity relied on by plaintiff as an explanation for her long stay in Japan is sufficient to bring her within cases which have refused to apply the definition of 'enemy' literally because of an element of compulsion, or at least of lack of free will, in the case. In the *Josephberg* case, *supra*, the court held that the mental incapacity of the alleged 'enemy', a naturalized American citizen, made it impossible to say that his prolonged stay in Italy was voluntary; in *Stadtmuller* v. *Miller*, 2 Cir., 1926, 11 F. 2d 732, 45 A.L.R. 895, the court held that a German citizen, a resident of the United States, who in the course of travelling for his health entered Germany to settle his parents' estate on his way back to the United States and was prevented by military regulations from leaving Germany, was a 'transient' and hence not a 'resident within' Germany. On the contrary, the facts alleged by plaintiff herein show that her residence in Japan was deliberate, whatever its motivation.

"The second ground of the plaintiff's argument is based on the premise that the purpose of a suit under Section 9 (*a*) of the Trading with the Enemy Act is to determine whether the vesting of the plaintiff's property served any purpose of the Act, and that such purpose is either to assist the war effort of the United States, or to hamper the war effort of the enemy. In this connection, plaintiff argues that since the corporation whose stock was involved engaged in the manufacture of food sauces, and since control of the corporation was at all times in the hands of the plaintiff's husband in Chicago, this court should hold that the vesting was erroneous because it had no effect on the war effort of either belligerent. Plaintiff's argument, I think, misconstrues both the general purpose of the Act as a war measure and the purpose of a suit to recover vested property under Section 9 (*a*). The scope of the power to vest alien property under the Act is not limited to property useful as war industries. The purpose of a suit to recover, although a suit in equity, is not to provide judicial review of every aspect of the executive action which vested alien property, but simply to establish a right, title, or interest to the property in one not an enemy or an ally of an enemy. Furthermore, plaintiff's argument that property in friendly hands (*i.e.*, in the hands of plaintiff's husband, a Japanese national resident in the United States) was not intended by Congress to be seized under the Act, if adopted, would virtually destroy the Act, because it is only property in the United States or in territory subject to the jurisdiction of the United States which, as a practical matter, can be seized, and such property will usually, if not always, be in the custody of one at least ostensibly friendly to the United States. It is therefore the enemy ownership of the property which determines whether it can be seized, the attitude of the custodian being immaterial. Obviously, enemy property located in an enemy country would be beyond the effective jurisdiction of the United States to seize; and property present in the United States which is owned by enemy aliens resident in enemy countries will usually, if not always, be in the hands of friendly custodians, since enemy aliens present in the United States and actively hostile to this country would be interned and thus in no position to act as custodians.

" The defendant has also called the court's attention to Section 12 of the War Claims Act of 1948, Public Law 896, 80th Congress, 2nd Sess., which amends the Trading with the Enemy Act by adding thereto Section 39, 50 U.S.C.A. Appendix, S. 39. This section provides that no property or interest therein of Germany and Japan or of any national of either country vested by any officer or agency of the United States shall be returned to the former owners or their successors and no compensation shall be paid them. The defendant has suggested that this section prevents recovery by the plaintiff herein because she is a national of Japan. I do not think this section is relevant to a case brought under Section 9 (*a*) of the Act. If a plaintiff in a Section 9 (*a*) suit is an enemy or an ally of an enemy, the suit fails under the provisions of Section 9 (*a*), not because of the provisions of the new Section 39. The real purpose of the new Section 39 is indicated by the provision that the net proceeds of property vested under the Act, after administration, liquidation, and disposition pursuant to the provisions of the War Claims Act of 1948, shall be paid into the Treasury, in which, under Section 13 (*a*) of the War Claims Act of 1948, 50 U.S.C.A. Appendix, s. 2012 (*a*), there is created a trust fund known as the War Claims Fund consisting of all sums paid into the Treasury pursuant to the provisions of Section 39 of the Trading with the Enemy Act. In connection with other sections of the War Claims Act, these sections reveal a third purpose not mentioned by plaintiff among the reasons for vesting enemy property, namely, the application of enemy assets to the relief of the victims of enemy aggression.

" Since the plaintiff is an enemy as defined in Section 2 of the Trading with the Enemy Act, she cannot maintain a suit under Section 9 (*a*) to recover property vested by the Alien Property Custodian. I have reached this conclusion after considerable study and with some reluctance, since it involves the confiscation of a substantial portion of the life work of the plaintiff's husband. It is unfortunate that Congress, in determining the national policy respecting the vesting of enemy property, has not taken into account the fact that because of its prior immigration and naturalization policy, Japanese have

Case No. 118 Contd. not been able to become naturalized citizens and hence are especially vulnerable to the technical definitions under the Trading with the Enemy Act. A naturalized American citizen in the position of the plaintiff herein might have had constitutional protection against the sweeping definition of 'enemy' under the Act. Compare *Josephberg* v. *Markham*, *supra*.

" The defendant's motion is granted, and this action is accordingly dismissed."

[Report: 88 F. Supp. 897.]

Case No. 119

Enemy Character—Exemption from Treatment as an Enemy—"De-enemization"—National De-enemization Measures and Inter-Allied Agreement of 1947 on Reparation Payments—The Law of Holland.

Re EX-CROWN PRINCE FRITZ VON HOHENZOLLERN.

Holland, Council for the Restoration of Legal Rights (Judicial Division).[1] *June* 21, 1949.

THE FACTS.—By the Royal Emergency Decree on Enemy Property of October 20, 1944 (*Official Journal*, No. E 133), the Netherlands Office for the Administration of Enemy Property (Beheers-Instituut) was empowered, on the application of any enemy national and for special reasons, to declare that he should no longer be deemed to be an enemy national. Appeal from a refusal to make such a declaration lay to a judicial body, *viz.*, the Division for Judicial Settlement of the Council for the Restoration of Legal Rights. The "special reasons" for which the application could be granted covered a wide ground.

In the case of the German ex-Crown Prince Fritz von Hohenzollern, "de-enemization" was refused on the ground that there was no evidence of particularly meritorious behaviour on his part *vis-à-vis* the Netherlands or the Allied Powers. The appellate body said: "A single expression of disapproval of Germany's invasion of Holland and an occasional act of magnanimity towards Dutch subjects are not sufficient to justify his 'de-enemization'." There was no reason to apply to him any criteria different from those generally applied. His disapproval of the behaviour of Germany and his sympathy for the Stahlhelm (a German association of ex-service men of the First World War) had been inspired by love for his own country and his fear that it was about to be ruined by the Nazis, rather than by any sympathy for the conquered countries or by any desire to avert their downfall.

[Report: *N.O.R.*, V, No. 1499.]

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[1] See *Annual Digest*, 1947, p. 253.

NOTE.—Although the procedure of "de-enemization", as here described, is peculiar to Dutch municipal law, it is of sufficiently general interest to warrant the present report. The general attitude adopted by the appellate body provided for by Dutch legislation appears from the following judgments in which "de-enemization" was granted.

Judgment of October 6, 1949 (*N.O.R.*, V, No. 1685): "de-enemization" allowed on the ground that the applicant had been very severely persecuted by the German authorities over a period of ten years.

Judgment of July 29, 1949 (*ibid.*, No. 1666): "de-enemization" allowed on the ground that the applicant had behaved during the occupation in exactly the same way as the majority of the Dutch people themselves.

Judgment of June 27, 1948 (*ibid.*, No. 1593): "de-enemization" granted to a woman of Dutch extraction who, after having married a German in 1933, divorced him in 1947 and recovered Netherlands nationality, and who had always given expression to her hatred of and aversion to the Germans.

Judgment of October 27, 1949 (*ibid.*, No. 1583). In this appeal doubt was expressed as to the permissibility of the procedure of "de-enemization", having regard to the terms of the Inter-Allied Agreement on Reparation Payments of 1946[1] and the Inter-Allied Reparations Agency Accounting Rules.[2] It was *held*, however, that these international instruments left unimpaired the power of the Netherlands Government to decide, through its competent organs, which German assets situate in the Netherlands should be held to be enemy property. Article 6A of the Agreement regulates dealings with German External Assets. Article 6D exempts the property of, *inter alia*, nationals of a country which is a Member of the United Nations, who were not nationals of Germany at, *inter alia*, the time of the occupation of that country by Germany. Article 5A of the Accounting Rules gives as a datum point January 24, 1946. In the present case the applicant was resident in Germany on the last-mentioned date and hence came within the terms of the Agreement. A "non-enemy declaration" was, however, granted on the ground that the applicant had been in the service of a Dutch firm in Holland since 1896, that he had become a partner of that firm in 1920, that he had married a Dutch woman in 1903 and that their daughter had married a Dutch subject, so that the applicant had in fact become an integral part of the Netherlands population. His property was therefore exempt from the restrictions imposed by Article 6A of the Agreement. See, in the same sense, the judgments of June 24, 1948 (*N.O.R.*, V, No. 1593), December 1, 1948 (*ibid.*, No. 1393), September 8, 1949 (*ibid.*, No. 1573), and March 6, 1950 (*ibid.*, No. 1721).

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[1] Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency, etc., signed at Paris on January 14, 1946 (*Treaty Series*, No. 56 (1947)).

[2] Rules of Accounting for German Assets Approved by the Assembly of the Inter-Allied Reparations Agency on November 21, 1947. Published with the Report of the Secretary-General of the Agency for 1948 (Brussels).

iii.—Of Vessels

Case No. 120 **Enemy Character—Merchantmen—Conclusiveness of Enemy Flag—Vessel Owned by Enemy Corporation—Enemy Corporation Owned and Controlled by Neutral Corporation—Enemy Flag Accepted under Pressure.**

LEVER BROTHERS AND UNILEVER N.V. AND OTHERS *v.*
HIS MAJESTY'S PROCURATOR-GENERAL.

THE UNITAS.

England, Judicial Committee of the Privy Council,
on appeal from the Prize Court.

(Lord Porter, Lord Simonds, Lord Normand,
and Lord MacDermott.)

March 1, 2, 7, 8, and 9, 1950 ; *May* 8, 1950.

THE FACTS.—The question in this case was whether the flying of the enemy flag was conclusive of the enemy character of a vessel for the purpose of prize law. The *Unitas* was a whale factory ship of about 21,000 gross registered tonnage. Throughout her life, from her building in 1937 until her seizure in prize by the Royal Navy after the surrender of Germany in 1945, she was registered in the port of Bremen, was of German nationality and flew the German flag.

She was owned by, and registered in the name of, a German limited liability company called Margarine Verkaufsunion G.m.b.H., referred to hereafter as " Verkaufs ". The first appellants, however, Lever Brothers and Unilever N.V. of Rotterdam, hereafter called N.V., were a Dutch company, its shares being publicly held, mainly by British and Dutch nationals. N.V. owned the entire share capital of the second and third appellants, also Dutch corporations, shortly called " Marga " and " Saponia ". They in their turn jointly held the entire share capital of a German company shortly called " Margarine Union ", and Margarine Union owned the entire share capital of Verkaufs, who owned the ship *Unitas*. It was not disputed that the general control of the German companies was at all times exercised by N.V. in Rotterdam ; the German companies had their own boards of directors but they had no authority to deal independently with policy or management.

There was evidence that the German Government, before the outbreak of war, had brought strong pressure upon N.V., practically requiring them to build the *Unitas* and to put it under German registration.

In the Court below the respondent maintained that the condemnation of the *Unitas* was required on two main grounds :

first, that she flew the German flag, and second that the legal title to her was vested in an enemy company. In answer to the first of these contentions the appellants submitted that flying the enemy flag was only a prima facie ground for condemnation and was subject to exceptions which covered the present case. As to the second, they said it was the duty of the Prize Court to look behind the legal façade and determine where the true ownership lay (*Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co., Ltd.* [1916] 2 A.C. 307; *The St. Tudno* [1916] P. 291).

The President of the Court below held that the *Unitas* was good and lawful prize because the vessel's flag was decisive of her enemy character. Even if there were exceptions to the rule as to the enemy flag, the present case did not fall within them. Further, although the principle of the *Daimler* case might, in a case where the legal ownership was in a friend or neutral, be effective to disclose an enemy beneficial ownership and so lead to condemnation, it would not dispose of an enemy taint where the legal ownership was enemy. In any case, if it were permissible to treat Verkaufs as a mere "house of trade" of N.V., then it was the duty of N.V., after the outbreak of war between the United Kingdom and Germany, to dissociate itself from Verkaufs, which it had failed to do. From this decision the appellants now appealed to the Judicial Committee of the Privy Council.

For the appellants it was submitted in the first place that the enemy flag rule had always been subject to exceptions and was conclusive only where the flag had been accepted voluntarily. The present case was not one of a claimant who had chosen the flag of the enemy with such benefit as that might bring, and who therefore must take such inconvenience as followed; it was a case in which N.V. had been driven to accept the German flag under pressure, and the Board should consider the novel situation which had been created by the impact of the totalitarian Nazi régime on businesses carried on by neutrals in Germany. Secondly, concerning the legal ownership and registration of the vessel, it was submitted for the appellants that the *Daimler* case ([1916] 2 A.C. 307) was not a one-way rule and there was no authority for the President's conclusion that it applied in favour of the Crown but not in favour of the claimants in prize. Otherwise, indeed, it might be that a German court in Hamburg, applying the same international law, might have condemned the *Unitas* as a Dutch ship, and a British court on the same facts and on the same international law have condemned it as a German ship. Thirdly, there remained the difficulty that a neutral with a house of trade in the enemy country was under a duty to have dissociated itself from Germany within the period of the *locus poenitentiae*; but it was contended that the appellants in this case had fulfilled

Case No. 120 *Contd.* the requirements laid down in *The Anglo-Mexican* ([1918] A.C. 422, 425), that the rule of dissociation was part of the rule that deemed enemy or non-enemy character of goods to be determined by the commercial domicile of the owner.

Held : that the flag was conclusive of the enemy character of the vessel and that this ground alone was sufficient to justify the condemnation of the vessel. The appeal was, therefore, dismissed. Lord Porter, delivering the opinion of the Board, said:

" Having regard to the importance of the interests involved and in view of the likelihood of an appeal to their Lordships' Board, the President dealt fully with each of the three contentions put forward in order that full assistance might be afforded on appeal to their Lordships in considering each aspect of this case. But, as the Board think that the flying of the enemy flag alone is in this, and in most cases, sufficient to dispose of the matter at issue, they refrain from expressing any opinion on the other two difficult and controversial matters.

" Prima facie, of course, the flying of an enemy flag in wartime is conclusive of the nationality of a ship and subjects her to seizure and condemnation in a court of prize. If it is done voluntarily it is conclusive ; but, say the appellants, if under duress or, indeed, under pressure and against the will of the owner of the ship, it is but an element to be taken into consideration and may well be inconclusive.

" For this argument reliance is placed on the expressions over and over again appearing in the cases which begin with Sir William Scott's words in *The Vrow Elizabeth* (5 Ch. Rob. 2, 6) : ' In that case [viz., an earlier unreported case], however, it was held that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim ; and it was observed that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of Amiens had stipulated for the liberty of withdrawing British property from the ceded and restored islands. But the Governments of France and Holland afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of France or Holland, and on a destination to those countries. The difficulty which has arisen in the removal of British property, for want of shipping, may have induced our own Government to permit British ships to put themselves under Dutch flags for this particular purpose ; and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation of the general rule.'

" This consideration was repeated in *The Fortuna* (1 Dods. 81, 87), in the words of the same judge : ' All that the court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them '. He adds what is germane to another aspect of this case, ' But they do not bind other parties as against him '.

" It will at a later stage be desirable to analyse the width of the exception to which Lord Stowell refers, but at the moment the quotations set out above are examples of those relied on by the appellants in support of the proposition that to be bound by the rule of the flag the shipowner must voluntarily adopt it and not be coerced into its use."

His Lordship here described in detail the allegations made in M. Rykens' affidavit which had been adduced to prove that the appellants had been coerced into accepting the enemy flag. It appeared that currency restrictions imposed by the German Government prevented credit owed by Verkaufs to N.V. from being exported outside Germany. By 1936, therefore, N.V.'s subsidiary companies in Germany had accumulated cash and investments amounting to about 61,000,000 " blocked " and " inland " marks. The German Government eventually permitted the export of some of this money in the form of ships to be built in Germany on behalf of N.V. for sale to foreign purchasers, although even this concession was made on expensive and unfavourable terms. The German Government later proposed that, under this scheme, a fleet of whalers be built for operation under the German flag, and chartered to a German concern in which the appellants would have no more than half share, the whalers not to be transferred from the German flag without the consent of the German Government. The *Unitas* was the factory ship of the fleet. The history of the negotiations did not show duress, or indeed undue pressure, by the German Government, but the Court was satisfied that the hidden threat was there, and that if N.V. had not consented, its German assets would have been confiscated and its business in Germany restricted to the minimum. Lord Porter then continued :

" Their Lordships are prepared to accept for the purpose of their decision Rykens' statements, but they are nevertheless of opinion that they are insufficient to constitute a ground for rejecting the conclusiveness of the fact of flying the German flag. In the course of his judgment the President said that he did not doubt at all that the German Government were in a position to bring economic pressure on foreign concerns trading in the country through German subsidiaries ; nor would they hesitate to bring to bear any such pressure as they thought would serve their purpose ([1948] P. 218). Indeed, he envisages the possible confiscation of N.V.'s German business as one of the steps which might be taken ; and in their Lordships' view the

Case No. 120 *Contd.*

threat is none the less serious though one of the adverse actions which the German Government contemplated was the cancellation of the orders for ships to be built in Germany and sold abroad. In any case, it was a threat of the most serious character and their Lordships are in no sense minded to minimize its importance.

" But the question remains whether a threat to the economic interests or even existence of the N.V.'s German subsidiaries is enough to render a ship flying the German flag immune from the sanction of seizure and condemnation. It does not, in their Lordships' view, assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth, it was not involuntary in the sense of being unintentional : it was a deliberate choice taken between two distasteful alternatives. It is only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that that election was made two years before war broke out and, though no accounts have been furnished and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage at any rate in 1938 and may well have earned considerable emoluments for her owners. The fact that she was built as a result of German pressure and German threats because a worse fate might have befallen the claimants if they did not give way seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.

" The strictness with which the rule is followed is accentuated again and again in the prize law of many countries and in the text-books dealing with the topic. Wheaton, Hall and Oppenheim all state the principle in unqualified terms. It is enough to quote the first named (8th ed.) at p. 588 : ' According to the rules observed in the British Prize Courts the flag of the enemy is conclusive against the ship flying it, but our courts can go behind a neutral flag and ascertain who is the real owner, and enemy shares in a ship flying a neutral flag can be condemned '.

" The cases to the like effect are well known and numerous. The two earliest reported, *The Vigilantia* (1 Ch. Rob. 1) and *The Vrow Elizabeth* (5 Ch. Rob. 2), contain unequivocal statements to the like effect, and indeed it is not disputed that this is the general rule. But it is said that the principle does not apply except in cases where the owners voluntarily chose to accept the benefit of the enemy flag for their own advantage. To support this argument reliance is placed on the type of expression to be found in *The Fortuna* (1 Dods. 87), where the wording is : ' All that the court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them . . . but they do not bind other parties as against him ' ; or perhaps more clearly in *The Primus* (Spinks P.C. 48, 50), where the words used are : ' If he reap the benefit accruing during peace, he must also take the consequence of war.'

" Similar expressions are to be found in many of the cases, but in their Lordships' opinion a conclusion that a shipowner who built his ship, unwillingly it may be, but still with the object of avoiding a position less favourable to himself, and sailed her under an enemy flag would avoid seizure and condemnation in prize in the event of war is altogether unjustified. The statement that the shipowner has taken the benefit and must endure the consequences is not in essence a limitation of the doctrine, but an explanation of its origin.

" It is true that as pointed out above Sir William Scott says in *The Vrow Elizabeth* (5 Ch. Rob. 7) : ' I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction ', and instances a case where after the peace of Amiens the French failed to fulfil an undertaking to provide shipping to repatriate British subjects and ships flying an enemy flag were thereupon used for that purpose, and after outbreak of war held free of condemnation. So, too, in *The Tommi* ([1914] P. 251, 256) it was said : ' The law with regard to the effect of carrying the flag is perfectly clear, namely, that if a ship does sail under a particular flag, unless there are very special exceptions, she has elected to enjoy the protection of the State whose flag she flies, and she is regarded as a ship belonging to that State.'

" Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in prize, but such circumstances must be very exceptional. The few in which a ship flying the enemy flag has escaped condemnation are all of that character. In addition to the cases mentioned in *The Vrow Elizabeth* (5 Ch. Rob. 7) their Lordships' attention has only been called to three, and they are not aware of any others. Those three are *The Palme* (Dalloz, *Jurisprudence générale*, vol. III, 94), mentioned in Wheaton, p. 153, *The Taxiarchis* (20 R.G.D.I.P. 518), also referred to in Wheaton, and *The Pontoporos* (1 Br. & Col. P.C. 371).

" *The Palme* was a German vessel purchased by the Swiss Red Cross from German owners. The Swiss government would not allow their flag to be flown, the French government forbade the use of its flag, and in default of any other the German flag was retained and a German agent appointed. The circumstances were peculiar and exceptional, and a French Prize Court decreed her release.

" *The Taxiarchis* (20 R.G.D.I.P. 518) was a case exhibiting some features of the same kind : she was British-owned and registered in Cyprus, which at that time was nominally under

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Turkish rule but actually administered by Britain. There was no national flag of Cyprus, and therefore she flew the Turkish flag. In each of these cases, the absence of a national flag coupled with the neutral or friendly nationality of the owners was the deciding factor.

"In *The Pontoporos* (1 Br. & Col. P.C. 371), a Greek ship was captured by the *Emden* and used as a coaling auxiliary, but her master never consented to her use as such and was kept a prisoner. The case is a true example of involuntary submission to enemy duress. Indeed, the Prize Court which tried her case contrasted it with that of *The Carolina* (4 Ch. Rob. 256) where the master had, though unwillingly, accepted service under an enemy belligerent, and the basis of the decision is explained as follows (1 Br. & Col. P.C. 379): 'The act of force,' it was said, 'referred to by the learned judge would seem to be the laying of an embargo on the ship, and fitting her up as a transport against the will of the master, and during his absence; but the facts show that when he returned he acquiesced.' And in *The Carolina* (4 Ch. Rob. 256) itself, Lord Stowell says (4 Chr. Rob. 261): 'A man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act.'

"The circumstances in the last-mentioned case in substance resemble those now under consideration, whereas those in the three cases relied on by the appellants are in a different category. It is, as a general rule, where captors are concerned, the use of the enemy flag which entitled them to seize. Neutral ownership of itself does not protect the ship. The *Ocean Bride* (Spinks P.C. 66) was British owned and flew the British flag but was nominally transferred to Russian ownership to protect her from seizure in case of war between this country and Russia. On those facts being established, she was released. As showing the importance of the flag it was said in the course of the judgment (*ibid.* 73): 'If this vessel had been sailing under the colours of an enemy, I should say this was a claim which could not be sustainable; but here she remains navigated under British colours—and that prevents a difficulty which would have been insuperable—for, if the vessel had been under Russian colours, that would have been conclusive against all the world, for reasons I need not refer to, as it is a well-known principle.'

"Their Lordships have thought it desirable to deal at some length with the grounds on which the appellants support their case, as the claim is a large one and the principle at stake important. From the authorities which have been referred to, it is clear that the flag under which a ship sails constitutes one of the most, if not the most, important elements which a Court of Prize has to consider in determining whether she is rightly seized and condemned as prize. But it is not necessary for them to set exact bounds to the limitations to be placed on the dicta that the flying of an enemy flag is conclusive, or to pronounce on the correctness or otherwise of every decision relied on or the accuracy of every individual expression of opinion contained therein. Whatever view may be taken on the matter, the present case is, in their Lordships' opinion, far removed from those exceptional cases in which that rule may be discarded.

"In the view of the Board the *Unitas* was rightly seized and condemned, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, with costs."

[Reports: L.R. ([1950] A.C. 536; 66 T.L.R. (Pt. I) 1130; [1950] 2 All E.R. 221; 1 Ll. P.C. (2nd) 277, P.C.).]

VII.—The Binding Force of the Laws of War

War—Laws and Customs of—Treaty Law and Custom—Preamble of the Hague Regulations.

See Case No. 122 (*Auditeur Militaire* v. *Krumkamp*).

Rules of Warfare—Observance of—Military Necessity.

See Case No. 145 (*In re Lippert*).

VIII.—Enforcement of the Laws of War

ii.—Punishment of War Crimes. Defence of Superior Orders

War—Enforcement of Laws of—Punishment of War Crimes—Sphere of Applicability of London Agreement of August 8, 1945, concerning the Establishment of an International Military Tribunal—Jurisdiction of State against which Offence Committed—Collective Responsibility. **Case No. 121**

In re GRAFF AND OTHERS.

France, Court of Cassation, Criminal Division.

August 3, 1950.

THE FACTS.—This was an appeal by nineteen former members of the regiment "der Führer" of the German army against a decision of the Chambre des mises en accusation of the

Case No. 121 *Contd.*

Court of Appeal of Bordeaux remanding them for trial by the permanent military tribunal of Bordeaux on charges of homicide, pillage and arson. It was contended on behalf of the appellants that the Court had not considered evidence of their individual guilt, but had taken into account only their membership of a group which had, collectively, been guilty of certain crimes; and that, while it was empowered to do so under a French law of September 15, 1948, concerning the punishment of war crimes, the principle of collective guilt and the retroactivity of penal legislation were contrary to the London Agreement of August 8, 1945, concerning the establishment of an international military tribunal, which laid down the principle of the respect of human rights, and that, in case of such a conflict, international law must prevail.

Held: that the case must be retried. The principle of collective guilt was not contrary to international law. However, the persons concerned must be given an opportunity to clear themselves by reference to the fact that they were forcibly incorporated in the criminal group, and that they did not personally take part in the commission of crimes. The Court said:

" Following the declarations of the allied Governments of 25 November 1941, 13 January 1942, and 30 December 1943, which made the punishment of war crimes one of the war-aims, it is for the French nation to provide by its tribunals and according to the rules of its legal system for the punishment of those crimes which were committed on French territory, or against French nationals. The Ordinance of 28 August 1944 which laid down the methods of punishment is the expression of the sovereign will of the French legislator, without in any way violating any provision of international law. The same is true of the Law of 15 September 1948, which supplements that Ordinance, and Article 1 of which, concerning the case of crimes committed by the collective action of an enemy formation, permits the judge—without obliging him to do so, and leaving the decision to his discretion—to declare every member of such a formation a party to the crime unless he shows that he was forcibly incorporated in the group and did not take part in the commission of the crime. . . . It cannot be said that that provision is contrary to the London Agreement or the Nuremberg judgment which followed it. Neither the Agreement nor the judgment apply to war crimes committed on French territory or against French nationals and French protected persons. On the contrary, the London Agreement provides expressly, both in its preamble and in Article 6, that German officers and soldiers and members of the Nazi Party who have been guilty of crimes and atrocities must be sent to the country where their crimes were committed for trial in conformity with the laws of liberated countries and of the free Governments there established.

" Any conflict between these documents of international law and Article 1 of the Law of 15 September 1948 can only be based on the fact that that Article refers not to any enemy formation which may be collectively guilty of war crimes, but only to those ' belonging to one of the Organisations declared criminal by the International Military Tribunal at Nuremberg ', and thus bases itself in that respect on the declarations of criminality pronounced by the Nuremberg Tribunal. Articles 9 and 10 of the London Agreement empowered the International Military Tribunal which it set up, to consider, in connection with the trial of the governors of the Reich, and, in proper cases to declare, the criminal character of the organisations to which the accused had belonged. Such declaration was to be final and not subject to review. The Nuremberg Tribunal was accordingly called upon to consider the essential elements of the crime of membership of a ' criminal organisation ' by reference to which prosecutions could later be instituted before the competent tribunals against members of such organisations. The International Military Tribunal, anxious that the declarations of collective guilt should not give rise to abusive prosecutions, based only on formal, unwitting or forced membership of such organisations, wanted to protect persons who did not know of the criminal aims or acts of the organisations, or were mobilised by the State and so became members but were never personally involved in the commission of crimes, even though it stated that there was no ground for hesitating to declare the accused organisations to be criminal on the pretext that the theory of the criminality of a group was new. It accordingly only declared, in respect of each organisation with regard to which it found the indictment to be well-founded, such as the ' S.S.', the criminality of the ' group ' composed of the members of the organisation who became or remained members knowing that it was being used for the commission of crimes, or who personally, as members of the organisation, participated in such crimes. At the same time, these formulae, while aimed at the protection of members of the accused organisations who were in good faith, by preventing prosecutions based on the mere fact of membership, necessarily imply the recognition of the criminality of the organisations concerned. . . . In making the collective action of formations belonging to organisations declared criminal by the International Military Tribunal punishable, the French legislature, which, moreover, took account of the reservations expressed by the Tribunal in its sovereign determination of the elements of criminality, did not pervert the declarations of that Tribunal, and did not violate the conclusions expressed in its judgment. Accordingly the law of 15 September 1948 must be applied. . . .

" However, Article 1 of that law excepts persons who prove

Case No. 121 Contd. both that they were forcibly incorporated and that they did not participate in the crime. This means that the Court must expressly draw the attention of the accused to their right to bring such proof, and must give them the time and means to collect the necessary evidence. This was not done in many of the cases under review. . . ."

[Report : *Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 701.]

NOTE.—See also *In re Hauck, Voigt and Others* (*Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 521), decided by the Criminal Division of the Court of Cassation on June 3, 1950. The Court held that the convictions of the appellants of war crimes were based on the Ordinance of August 28, 1944, that that Ordinance merely applied to the punishment of war crimes the principles laid down in international conventions concerning the laws and customs of war, and that it did not contain any provisions which were contrary to the London Agreement of August 8, 1945, to the Judgment of the International Military Tribunal at Nuremberg, or to the Universal Declaration of Human Rights and the Charter of the United Nations. And see, to the same effect, *In re Paarmann, Habener and Others* (*Dalloz hebdomadaire*, 1950, *Jurisprudence*, p. 313), decided by the Criminal Division of the Court of Cassation on April 21, 1950.

Case No. 122

War—Enforcement of Laws of—Punishment of War Crimes—Prescription—Laws and Customs of War—Treaty Law and Custom—Preamble of the Hague Regulations—The Individual in International Law—Universal Declaration of Human Rights—Applicability to Time of War—The Law of Belgium.

AUDITEUR MILITAIRE *v.* KRUMKAMP.

Belgium, Military Court of Brabant. February 8, 1950.

THE FACTS.—The accused, a German national, was charged with having tortured Belgian nationals during the German occupation of Belgium. It was contended on his behalf, firstly, that the prosecution was time-barred, and secondly, that the acts committed by him were not contrary to the laws and customs of war and were therefore not punishable by Belgian courts.

Held : that the accused was guilty. The period of limitation did not run while the prosecution was made impossible by the enemy occupation of Belgium. The torture of the inhabitants of occupied territory was contrary to the laws and customs of war. The Court said :

" Article 2 of the Law of 29 April 1943 provides that the period of limitation shall not run in respect of crimes or delicts the prosecution of which was prevented or postponed by the enemy occupation of the country. That provision is clearly applicable to offences committed by German nationals. The report to the Council explains that the Law is intended to prevent Belgian nationals and aliens, for whom the presence or intervention of the occupant procured a temporary immunity, from escaping their due punishment by the aid of prescription. No distinction is made between combatant and non-combatant aliens. That part of the report refers specifically to Article 1 of the Law. But it is clear from the content and the general structure of the Law that the provisions of Article 2 also are equally applicable to aliens and to Belgian nationals.

" It is necessary to determine the date on which the period of limitation again started running. Article 1 of the Law of 29 April 1943 fixes ' the day on which the national territory shall be completely freed from enemy occupation ' in respect of crimes provided for in that article. On the other hand, in respect of crimes provided for in Article 2 it leaves the Courts to determine the date on which there was no longer any obstacle in the way of prosecutions. In the present case that date cannot be earlier than 8 May 1945, the date of the capitulation of Germany. Before that date prosecution was made difficult or impossible by the fact that most of the victims and witnesses, if they had not died in the German prisons, were still detained and hence incapable of filing complaints or of giving evidence. Moreover, the accused himself was in Germany sheltered from prosecution, and could only be identified after the cessation of hostilities on the European fronts.

" Article 2 of the Law of 20 June 1947 provides that ' Military Courts shall have jurisdiction in respect of offences against Belgian criminal law which were committed in violation of the laws and customs of war.' The prosecution must thus prove not only that the offences are punishable under Belgian law, but that they were committed in violation of the laws and customs of war, and must show which laws and customs of war were transgressed. That proof is all the more essential as there is no article in the Annex to the Hague Convention which expressly prohibits the maltreatment of the inhabitants of occupied territory, although Article 46 obliges the occupant to respect the life of individuals.

" But it should be noted that—apart from and in addition to everything that is laid down in treaties—international law has remained customary law. ' It is not a collection of codes and statutes, but the progressive expression from case to case, of the moral judgments of the civilized world ' (H. L. Stimson, *Foreign Affairs*, January 1947). The London Charter, the Statute of the International Military Tribunal and, consequently, the Nuremberg judgment, are expressly based on custom.

" Moreover, in the preamble of the Annex to the Hague Convention concerning the Laws and Customs of War on Land,

Case No. 122 *Contd.* the High Contracting Parties themselves made it clear, in the following terms, that the laws laid down were not to be considered to be exhaustive : ' It has not been possible to agree forthwith on provisions embracing all the circumstances which occur in practice. . . . Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirement of the public conscience.'

" In searching for principles of international law arising out of the usages established by civilized nations, the laws of humanity, and the requirement of the public conscience, the Military Court is today guided by the Universal Declaration of Human Rights, adopted without opposition by the General Assembly of the United Nations on 10 December 1948. In Article 5 that Declaration provides : ' No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .'

" The defence invokes the hard necessities of war as well as the fact that the accused was a policeman and that the activity of the victims was hostile and dangerous to the occupant. However, in the matter of respecting human rights no difference can be made between times of peace and times of war. In particular, a war of aggression which has been declared criminal on the part of those who planned, prepared and waged it, cannot serve as a justification in respect of acts which must be condemned without reference to time, place or circumstance on the ground that they injure the dignity of man.

" In any case, even if a state of war justifies acts of hostility on the part of belligerents, it cannot justify acts which are contrary to the laws and customs of war. The fact that the victims engaged in activities hostile to the occupant exposed them to penalties regularly inflicted by the military tribunals of the enemy in pursuance of his laws—a risk which they had accepted and the consequences of which they had to bear—but did not authorise the accused to subject them to torture or maltreatment even with a view to establishing their guilt, or with a view to discovering hidden arms and the ramifications of the resistance movement to which the victims belonged."

[Report : *Pasicrisie belge*, 1950, III, pp. 35–40.]

War Crimes—Prosecution of—Jurisdiction of Tribunals—Article 46 of the Hague Regulations of 1907—Denial of Medical Aid—War Crimes and Crimes against Humanity—Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field—Crime against Member of Own Forces—Charter of International Military Tribunal of Nuremberg—Lack of Jurisdiction. **Case No. 123**

In re PILZ.

Holland, District Court of The Hague (Special Criminal Chamber).[1] *December* 21, 1949.

Special Court of Cassation. July 5, 1950.

THE FACTS.—In occupied Holland a young Dutchman who had enlisted in the German army attempted to escape from his unit and was fired on while so doing. The accused, a German military doctor, was prosecuted after the war for having refused to allow German personnel to give the wounded man medical attention and for having abused his authority by ordering, or at least permitting, a subordinate to shoot him. In its judgment of December 21, 1949, the Special Criminal Chamber of the District Court of The Hague held that it had no jurisdiction to take cognizance of a case of this nature. On appeal by the Public Prosecutor,

Held (by the Special Court of Cassation): that the appeal must be dismissed. The Court of Cassation agreed with the Court below that the Netherlands courts would have jurisdiction in this case only if the German doctor had committed a war crime, and that, therefore, it was necessary to enquire whether the acts for which he was prosecuted constituted a violation of the laws of war. The Hague Regulations of 1907 concerning the laws and customs of war had not, however, been violated, since the object of the Regulations, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces. The legal position of the latter was regulated not by international convention, but by the military law of the occupying Power. As the Court below had established as a fact, the wounded person belonged to the occupying army. Under these conditions his nationality, or former nationality, was irrelevant, since by his enlistment in the Occupant's army he had forfeited the protection of the law of nations and had voluntarily submitted himself to the laws of the occupying Power. Nor did the Geneva Convention of July 27, 1929, for

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[1] The Special Criminal Courts in the Netherlands have gradually been replaced by Special Criminal Chambers formed within the existing District Courts, usually composed of the same judges who had acted in the Special Criminal Courts but without the military members.

Case No. 123 *Contd.* the Amelioration of the Condition of the Wounded and Sick in Armies in the Field apply, since this Convention only protected members of an army against acts by members of the opposing army. Denial of medical aid to the wounded soldier in this case and permitting his murder were, if proved, abominable crimes on the part of a military doctor, contrary to all humanitarian principles and to the calling of a physician. They did not, however, constitute war crimes, but were crimes in the domestic sphere of German military law and jurisdiction. Nor were the acts for which the German doctor was prosecuted in Holland crimes against humanity in the sense of the Charter of the International Military Tribunal, since the victim no longer belonged to the civilian population of occupied territory, and the acts committed against him could not be considered as forming part of a system of " persecutions on political, racial or religious grounds ".

[Report : *N.J.*, 1950, No. 681.]

Case No. 124 **War Crimes—Punishment of—Plea of Superior Orders—Reprisals—Mass Executions—Mass Arrests as Reprisals—Arson — Ill-Treatment of Arrested Persons — Taking of Hostages.**

In re BELLMER.

Holland, Special Criminal Court (Second Chamber), Leeuwarden. June 20, 1949.

Special Court of Cassation. March 20, 1950.

THE FACTS.—Friedrich Bellmer was Deputy Chief of the Foreign Section of the German Security Police and Security Service at Groningen and the immediate subordinate of B. G. Haase (see Case No. 144 in this volume). He had carried out the same or similar measures of terrorization. In his defence he pleaded (i) that seizures of hostages carried out by him were legitimate, and (ii) that he had acted in obedience to superior orders. The Special Criminal Court held that he was guilty and sentenced him to death. He appealed.

Held (by the Special Court of Cassation) : that the appeal must fail. The carrying out of raids and mass arrests of innocent Netherlands citizens under the cloak of so-called reprisals for attacks by members of the resistance movement could not be justified by the invocation of any principle said to be recognized by the law of nations allowing the taking of hostages. From the facts as established it emerged clearly that these raids were carried out as measures of revenge and therefore were not considered by the Germans themselves to be a taking of hostages. Consequently, it was unnecessary to consider whether, even though it might be lawful to take hostages in special circumstances, this would cover the indiscriminate seizure *en masse* of peaceful citizens in numbers out of all proportion to the acts for the prevention of which the measure was taken, and with the intention of sending them to concentration camps in Germany.

As to the defence of superior orders, in so far as this was a genuine plea and not merely an *ex post facto* invention of the defendant to excuse his criminal acts against the civilian population, it could not be accepted in exculpation, since the criminal character of all his acts must have been clear to the defendant himself. This was particularly so with regard to the permission given to subordinates to commit arson. Although there were cases in which acts of arson might reasonably be excusable when committed by subordinate soldiers or police officials (cf. *In re Wintgen*: *Annual Digest*, 1949, Case No. 178), that could not be the case with a man who, like the defendant, held a higher rank. The defendant had ordered a house to be burnt merely from anger at failing to find certain members of the resistance movement who were being sought; moreover, the owner of the house had no connection whatsoever with the persons sought.

[Reports: *N.J.*, 1950, No. 305; *N.O.R.*, V, No. 1686.]

War Crimes and Crimes against Humanity—Punishment of—Universality of Jurisdiction—Jurisdiction over Crimes Committed Outside Occupied Territory against Deported Nationals —International Law and Municipal Law—The Law of Holland. **Case No. 125**

In re Rohrig, Brunner and Heinze.

Holland, Special Criminal Court, Amsterdam.
April 29 *and December* 24, 1949.

Special Court of Cassation. May 15, 1950.

The Facts.—In November and December 1944 a large number of citizens of occupied Holland, collected in mass raids, were deported to the German town of Rees and its environs, lodged in improvised labour camps and put to forced labour in the construction of the fortifications of the German "West Wall". In these camps and under this régime of forced labour they were subjected to various forms of ill-treatment, as a result of which many died while the survivors suffered from disease, starvation, severe frostbite, etc. After the war three leading Nazi officials who had been responsible for the supervision and administration of the camps and forced labour—Rohrig, the Administrative Section Officer, Brunner,

Case No. 125 *Contd.*

the Senior Medical Officer, and Heinze, the actual camp commander—were handed over to the Dutch authorities and prosecuted. On April 29, 1949, the accused were found guilty by the Special Criminal Court of Amsterdam and sentenced to 6, 10 and 8 years' imprisonment respectively.[1] Some months later, while their appeal to the Special Court of Cassation was pending, they appealed to the Special Criminal Court for release on the grounds that under international law the Kingdom of the Netherlands had no jurisdiction to try and sentence German State officials on the charge of having committed war crimes outside the frontiers of the Netherlands even though such crimes had been committed against Dutch subjects.

Held (on December 24, 1949): that the application for release must be rejected. The Court considered the question in the light of the Netherlands Law of July 10, 1947, on German war crimes (*Official Journal*, No. H 233), public international law, and the relationship between municipal law and the law of nations, and held that the trial of war crimes committed by German State officials in Germany against Dutch nationals was within the jurisdiction of the Dutch courts under Dutch law. These courts would be bound to apply this law even if it were contrary to international law, which, however, it was not. When in 1947 a new Article, *27a*,[2] was added to the Decree on Special Criminal Law of December 22, 1943 (*Official Journal*, No. D 61), a reference to Article *27a* was inserted in Article 4.[3] Nothing in Article *27a* suggested that its operation was restricted to crimes committed on Netherlands territory. Nor could there be any question of an "exception recognised by the law of nations" as envisaged in Article 8 of the Criminal Code[4] and in Article 13 (*a*) of the Law of 1829 containing general provisions for the legislation of the Kingdom,[5] since the only question was the scope of Articles 4 and *27a* of the Decree. Nor were Articles 4 and *27a* in any way contrary to any written or customary rule of international law. The Court stated that, if there should be a direct contradiction between the two Articles mentioned and a rule of international law, the Court would still be bound to apply them, seeing that they contained positive Dutch law binding upon the Netherlands courts. For, although it could be contended that, as compared with Netherlands municipal law, the law of nations formed a body of rules of a higher order, this did not necessarily imply that a Netherlands law which was found by the courts to be contrary to such higher rule, should not be applied. Provisions of the national Constitution were similarly rules of a higher order as compared with provisions of an ordinary law, yet the Netherlands courts need not refuse to apply such a legal provision as being incompatible with the Constitution. Such a refusal would be contrary to unanimous legal opinion as explicitly laid down in Article 124, paragraph 2, of the Constitution.[1] The latter important provision was clearly derived from and based on the general principle of Netherlands public law pursuant to which interpretation of the Constitution by the Legislature (*i.e.* by the Crown and the States General) prevails over interpretation by the courts. Non-application of this general principle would conflict with the very bases of the Dutch system of public law. This same principle must accordingly also be applied in cases where, in the Court's opinion, an operative Dutch law is at variance with the law of nations. In such a case the courts must conform to the judgment of the Legislature which, by enacting the law, had implicitly, or perhaps explicitly, expressed their opinion that the Law did not run counter to the law of nations. From this it follows that, for internal legal matters, the Law must be deemed to conform with international law. As a result, even if the Court were of the opinion that Article 4, read with Article *27a*, was contrary to the law of nations, this could not and ought not to be a bar to its application. However, in the opinion of the Court there was in fact no question that the Articles were in conformity with international law. There was a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so-called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind. American tribunals, among others, have allowed, and still allow, themselves to be guided by this principle. The principle must be applied also to the trial of the accused, since the system generally adopted by the Germans of abducting large groups of the populations of the countries which they had occupied, for slave labour in Germany, and of subjecting them there to an inhumane régime, is a crime which is a matter of concern to the whole of mankind. [Report: *N.J.*, 1950, No. 682.]

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[1] Not reported.

[2] A general Article which entrusted the Special Criminal Courts with the trial of war crimes and crimes against humanity. See, for the complete text, *Annual Digest*, 1947, p. 199.

[3] Article 4 (of the 1943 Law) declared the Decree applicable to any person who had committed or should thereafter commit outside the Kingdom in Europe, *inter alia*, a crime as defined in Articles 26 and 27 (including betrayal of fellow citizens to the enemy and injuring them with the help of the enemy), provided that it was committed against or with respect to a Netherlands subject or a Netherlands legal entity or that Netherlands interests were or could be prejudiced thereby.

[4] (Of 1886.) Article 8 runs as follows: "The applicability of Articles 2–7 (*i.e.* the Articles which define the scope of the Dutch Criminal Code) is declared to be subject to any contrary provision of the law of nations."

[5] The new Article 13 (*a*) of this Law (which dated from 1917) provides as follows: "The jurisdiction of the Courts and the carrying into effect of their judgments and other authentic acts are declared to be subject to any contrary provision of the law of nations."

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[1] In the cryptic formula: " The laws are inviolable ".

Held (by the Special Court of Cassation): that the Court had jurisdiction and that the penalties imposed must be increased to 17, 18 and 11 years respectively. If Dutch law was contrary to international law the former must yield and international law must be applied. Article 4 of the Decree on Special Criminal Law was, however, in accordance with international law as being based on the principle of "passive nationality" or "protection of national interests". The Court below had rightly rejected the application of the accused for immediate release, but on the wrong grounds, since it based its decision on the doctrine of the supremacy of national law over international law. The Special Court of Cassation had already decided in a number of judgments (*In re Zuhlke, Annual Digest,* 1948, Case No. 122; *In re Rauter, ibid.*, 1949, Case No. 193; *In re Beck, ibid.*, 1949, Case No. 93; and *In re Vogt, ibid.*, 1949, Case No. 164) that if in the trial of German war criminals such a conflict should in fact arise, Netherlands law would, *pro tanto,* have to yield. Article 124, paragraph 2, of the Netherlands Constitution cited by the Court below concerned the relationship between a statute and the Constitution; it had no relevance to the relationship between such a statute and a treaty. The exclusive competence of the Netherlands Legislature to "interpret" treaties as well as the Constitution, as postulated by the Court below, was neither expressed nor implicit in any rule or principle of Dutch public law. As a matter of fact the question was not whether the Legislature alone, and not the courts, was competent to interpret a treaty which was binding upon the Netherlands. The question was, to which provision must the Court give preference when or if the case arises that a national law comes into conflict with a rule which is the outcome of international collaboration with other States, in particular when the law is of a later date than the treaty. For in such a case the courts are faced with two rules of law, the conflict between which cannot be resolved by the application of the general principle of construction which obtains in any particular legal order between rules of equal rank, namely, that the later rule prevails over the earlier, but can only be resolved on the basis of the principle that the treaty, as a norm of higher rank—which directly affects the sovereign power of national legislatures—must be given precedence over purely municipal laws. This freedom of the courts to put municipal law to the test of international law, emanating from the very nature of the judicial function, could only be deemed to be denied to them if it were expressly forbidden, which was not the case. As a result, if Articles 4 and 27 (*a*), taken together, were really at variance with an overriding rule of the law of nations, they would have to yield as far as concerned foreign war criminals, who would then have to be tried according to rules of international law and not according to rules of Dutch law. However, this was not the case here. The Court had already laid down in its judgment in *In re Ahlbrecht* (see *Annual Digest*, 1947, Case No. 92) that the law of nations in its present state of development empowers a belligerent State to have enemy war criminals who have offended against its legal interests tried by the judicial organs designated by it on the basis of internationally accepted laws and customs of war. In the case of the State of the Netherlands, the Netherlands Legislature had assigned this jurisdiction to the Special Criminal Courts. The Court had, further, already decided in its judgment in *In re Gerbsch* (*Annual Digest*, 1949, Case No. 143) that this jurisdiction was not confined to crimes committed in Holland, but extended also to crimes committed against Dutch subjects in enemy territory by persons in the State or public service of the enemy. The same principle must apply equally to crimes committed by German soldiers or State officials against Netherlands subjects in other foreign countries. There was no reason to restrict the jurisdiction over war crimes committed by German soldiers or State officials to those committed in the Netherlands territory under occupation. In this respect the *locus delicti* was of lesser importance. Though, in general, the principle of jurisdiction over enemy war crimes operates within the doctrine of territoriality, the same order of ideas applies to the rule that war crimes must be tried on the basis of the principle of passive nationality (referring to the nationality of the victims) or even on the basis of the wider principle of the protection of national interests.

[Reports: *N.J.*, 1950, No. 504; *N.O.R.*, V, No. 1705.]

War—Enforcement of Laws and Customs of—Punishment of War Crimes—Offences Constituting War Crimes—Ill-Treatment in Germany of Belgian Civilian Prisoners. **Case No. 126**

In re KÖPPELMANN.

Belgium, Court of Cassation (Second Chamber).

November 27, 1950.

THE FACTS.—The appellant had been convicted on July 20, 1950, by the Military Court of Appeal of Brussels of offences against the laws and customs of war in that, as chief warder of a prison in Germany, he ill-treated Belgian and allied nationals in his charge. It was now contended on his behalf that Article 6 of the Charter establishing the International Military Tribunal defined violations of the laws and customs of war as murder or ill-treatment or deportation to slave-labour or for any other purpose of civilian populations of or in occupied territory, and that the acts committed by him did not fall into that category.

Held : that the appeal must be dismissed. The Charter establishing the International Military Tribunal was not binding on Belgian Courts. The acts of the appellant constituted offences against the laws and customs of war as understood in international law. The Court said :

" The London Agreement and the Charter of the International Military Tribunal were not approved by Parliament in accordance with Article 68 of the Constitution. The violation of their provisions is thus not a violation of the law within the meaning of Article 17 of the Law of 4 August 1932.[1] Since the words ' violation of the laws and customs of war ' in Article 2 of the Law of 20 June 1947 concerning war crimes have not been defined by the legislature, they must be interpreted in the sense usually given to them in public international law.

" The lower Court found that the appellant, as German chief warder of a prison, was guilty of ' premeditated and cold-blooded cruelties ' to Belgian nationals and nationals of countries allied to Belgium in Germany during the war. These cruelties consisted in blows, and in depriving of food and care persons physically incapable of assuring their own support. The acts were premeditated and led to the death of some victims.

" The laws and customs of war are not only intended to establish rules concerning and to set limits to the conduct of military operations by belligerent armies. They establish rules concerning and set limits to the authority of a belligerent State in its relations with the civil population of the State with which it is at war. The Annex to the Hague Convention of 18 October 1907, approved by the Law of 25 May 1910, provides that populations remain under the protection and the rule of the principles of the law of nations, as they result, in particular, from the laws of humanity and the requirements of the public conscience. Accordingly, in deciding that the cruelties inflicted by the appellant on nationals of Belgium or of countries allied to her were violations of the laws and customs of war, the Court below interpreted these terms in a manner conforming with their usual meaning in public international law."

[Report : *Pasicrisie belge,* 1951, I, p. 185.]

War Crimes—Criminal Liability of Judges of Occupying Power—Whether Failure to Observe Minimum Standards in Trial of Citizens of Occupied Territory is a Punishable Offence —Meaning of " Minimum Standards "—Right of Occupying Power to Qualify Punishable Offences.

See Case No. 147 (*Public Prosecutor* v. *Latza and Others*).

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[1] That Article provides that the Court of Cassation shall quash judgments which contravene the law.

IX.—Prisoners of War. Treatment of Wounded

Prisoners of War—Persons Entitled to be Treated as Prisoners of War—Reserve Officers—Status of Dutch Reserve Officers Released by Germany subsequent to the Capitulation in 1940. **Case No. 127**

In re SIEBERS.

Holland, Special Criminal Court, The Hague.
January 31, 1949.

Special Court of Cassation. February 20, 1950.

THE FACTS.—During the occupation of Holland the accused, an officer of the Foreign Section of the German Security Service, shot, without preliminary trial, a Netherlands reserve army officer who was wearing uniform at the time. He was also involved in the shooting of two civilians during a " round-up " in Rotterdam. After the war he was prosecuted for the crimes of murdering a prisoner of war and murdering members of the civil population of occupied territory. He was found guilty of these acts as being crimes against humanity. On appeal,

Held (by the Special Court of Cassation) : that the conviction must stand although what the accused had done did not constitute a crime against humanity [but, apparently, a war crime]. As far as the first item of the indictment was concerned, it was not necessary to enter into an examination of the legal position of Dutch reserve officers after their release from captivity, since in this case it was proved that the victim had been arrested during a " round-up " in Rotterdam and its environs with the intention of sending him to forced labour in Germany. He had put on his uniform and had produced a letter from the German Supreme Commander in the Netherlands dated October 15, 1943, giving to the reserve personnel of the Netherlands land and sea forces the right to choose between forced labour and resuming their prisoner of war status. The victim's right to be treated as a prisoner of war was therefore irrefutable, even in German eyes.

[Reports : *N.J.*, 1950, No. 303 ; *N.O.R.*, V, No. 1688.]

NOTE.—One of the most controversial questions during the war concerned the legal status of members of the Netherlands forces after the capitulation, for the majority were sent back to their homes in Holland without being kept in prison camps either in Holland or in Germany. In general, the German authorities considered them to be no longer prisoners of war and not even soldiers. Consequently, in subsequent trials of such men for acts held punishable by the Germans they were not accorded the status of prisoners of war. This question was particularly acute in cases where such persons attempted to escape to England, an attempt for which a prisoner of war could not be punished except by the disciplinary measures provided for in Article 54 of the Geneva Convention relating to the Treatment of Prisoners of War, of 1929. The men in question, however, were prosecuted and severely punished, their trial not being supervised by the Protecting Power. Moreover, even former officers were confined in German prisons or concentration camps, seized for forced labour in Germany, or arrested and held as hostages or reprisal victims. At a later stage of the war many (former) members of the Netherlands forces were persuaded, on false pretexts, to attend a general gathering, at Amersfoort, which ended in their mass arrest, on the ground, *inter alia*, that members of the army had acted against the Occupying Power. They were then forcibly removed *en masse* to Germany, where they remained until the end of hostilities as prisoners of war. Various explanations of these proceedings are possible :

(1) The former members of the Netherlands forces were initially " demobilized " and divested by the Occupant, as though he were sovereign, of their status as soldiers and reduced to the rank of civilians, but later they were restored to their former military status and as such again taken prisoners of war.

(2) They were never, nor could they be, divested by the Occupant of their status as soldiers, but they were liberated as prisoners of war in accordance with Article 10 of the Hague Regulations of 1907, and were made prisoners of war again later in their continuing capacity as enemy soldiers.

(3) They were never divested of their status as prisoners of war but were merely sent home by the Germans in preference to holding them in camps, and were later, in their continuing status as prisoners of war, reassembled in camps.

The first theory seems inadmissible because a belligerent cannot deprive enemy soldiers of their military status by purporting to reduce them to the rank of civilians ; nor can he make civilians prisoners of war. The second theory seems inadmissible because the release of prisoners of war in the sense of Article 10 entails sending them back to the territory of their home country if it is not under the control of the belligerent's forces ; the Article does not cover setting them free within territory subject to his control. The only acceptable view would seem to be the third one. This, however, clearly implies the illegality of many of the measures practised against members of the Dutch forces by the Occupant. It was to this unsolved controversy that the Special Court of Cassation alluded in its judgment. [J. H. W. V.]

Treatment of Sick and Wounded—Geneva Convention of 1929—Application to Members of Belligerent's Own Forces.

See Case No. 123 (*In re Pilz*).

XI.—Termination of War

War—Termination of—End of the War with Germany in 1945—Unconditional Surrender—Resumption of Trade Relations—Furtherance of Desertion by Soldier—Liability to Punishment only if Committed in Time of War. **Case No. 128**

PUBLIC PROSECUTOR *v.* H.

Holland, District Court (Police Court) of Zutphen.
January 31, 1950.

THE FACTS.—H. was prosecuted for having in April and May 1949 given food and shelter to his son, a deserter, contrary to Article 104, paragraph 2, of the Criminal Code, which forbade the aiding and abetting of desertion by a soldier in time of war. At that time the state of war between Germany and Holland had not formally terminated (see the Note below).

Held : that the accused must be acquitted. Since under Article 104 the offence was punishable only if committed in time of war, the Court must first of all decide whether, in April and May 1949, a state of war still existed. This was not the case as far as the Netherlands was concerned. A war ends not only by the conclusion of a peace treaty but also, *inter alia*, by the definitive cessation of hostilities and the restoration of the former friendly relations between the belligerents. (The Court referred here to Fauchille-Bonfils, *Traité de droit international public*, vol. II, § 1693, and François, *Handboek van het volkenrecht*, 1st ed., vol. II, pp. 658 *et seq.*) The war in which the Netherlands was involved in May 1940 had ceased when in 1945 the enemy surrendered unconditionally, hostilities were definitely ended, and, moreover, friendly relations—*inter alia*, by the conclusion of trade agreements—were resumed between the former belligerents.

[Report : *N.J.*, 1951, No. 115.]

NOTE.—Cessation of a war in the sense of international law differs from cessation of a "state of war" under domestic legislation. By an Act of the Netherlands Parliament of July 20, 1951 (*Staatsblad*, No. 311), Germany was declared to be as from July 24, 1951, no longer an enemy State for the purposes of the Royal Decree on Enemy Property.

War—Termination of—Continuation of State of War notwithstanding Cessation of Hostilities—Private Enemy Property—Powers of Executive with regard to. **Case No. 129**

MERCK CHEMICAL COMPANY *v.* NATIONAL GOVERNMENT.

Argentina, Supreme Court. June 9, 1948.

THE FACTS.—The Merck Chemical Company sought to recover possession of property which had been placed under

Case No. 129 *Contd.*

government supervision and control, in pursuance of the declaration of war against Germany and Japan, on the grounds that as the main capital of the Company was German and as the Company was managed from Germany, such control was necessary in order to prevent the resources of the Company from being used for enemy benefit. The Company maintained that the Government's attachment, supervision, and disposition of its property constituted arbitrary use of war powers by the executive branch, that its action amounted to a deprivation of rights guaranteed by the Constitution, and that doubt might be raised as to whether a state of war existed so as to justify resort to such powers by the Government. The action having been dismissed by the Cámara Federal Capital, the matter came by way of extraordinary appeal to the Supreme Court.

Held: that the appeal must be dismissed. The Executive had the power to determine the enemy character of the corporation in question. The war powers were properly used for the purpose of undermining the enemy's military potential. Such use could include efforts to control the economic resources of the enemy.[1] The Court said:

" It was with regard to such fundamental considerations that the then *de facto* Government of the Republic, for certain reasons, issued decree law 6945/45 declaring war on Germany and Japan as well as decree 7032/45 and the related decree 11.599/46. These latter decrees concerned the control of enemy property or sequestration as anticipated in the Inter-American Conference held in Mexico in February 1945. These decrees are national law, having been confirmed by laws 12.837 and 12.838,[2] approved by the Congress as reinstated in 1946, and are in conformity with the doctrine recently sustained by this Supreme Court. These laws, in short, and likewise international treaties concerning the same subject matter and similarly ratified, constitute the supreme law of the land in accordance with Article 31 of the Constitution. . . . A state of war necessarily presupposes a grave and imminent danger for the Nation. No one may invoke any right as superior when the independence, sovereignty, and internal and external security of the Nation is at stake. This Court has had occasion to emphasize this important point in its conclusion that ' a sovereign national government of limited powers would not be created without the necessary means for the defense of its existence and that of the social and political order which it is to guarantee '." [1]

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[1] The Court pointed out that the Articles of the Argentine Constitution dealing with war powers were analogous to certain Articles in the Constitution of the United States. The Court also cited certain decisions of the United States Supreme Court in reference to this point.

Article 67, clauses, 21, 22, 23, and Article 86, clauses 15, 16, 17, and 18, of the Argentine Constitution of 1863 are analogous to Article I, sec. 8, clauses 10, 11, 12, 13, 14, 15, and Article II, sec. 2, first sentence, of the Constitution of the United States. Reference was made to the following cases, among others: *Ware* v. *Hylton*, 3 Dallas 199; *Prize Cases*, 2 Black 635; *McCulloch* v. *Maryland*, 4 Wheaton 316; *Brown v. United States*, 8 Cranch 110; *Miller* v. *United States*, 11 Wallace 268; *Missouri* v. *Holland*, 252 U.S. 416.

[2] *Jurisprudencia Argentina*, 1946–IV, sec. leg., p. 7.

The Court referred to the appellant's contentions that the declaration of a state of war had not initiated actual hostilities, that the seizure of the property in question had taken place after the unconditional surrender of the enemy States and, furthermore, that the President had assumed judicial powers in violation of Article 95 of the Constitution, thereby depriving the appellant of his right of protection before the proper courts. Conceding the first contention, the Court pointed to the danger presented by the existence of enemy-controlled resources which could undermine the defence of the Republic or of the allied nations as well as contribute to the prolongation of the war.

" In regard to the fact that the property of the appellant was placed under control after the cessation of hostilities, it may be pointed out that apart from the obligation to initiate such action, founded in certain treaties ratified by the National Government, this circumstance is not a major issue, for juridically the state of war exists until peace has been made. This is a matter of common knowledge, confirmed in decree 10.002 of April 7, 1948, which provides in Articles 3 and 4 that the effects of the declaration of war remain in existence until the re-establishment of peace. It is fitting to add, furthermore, that the continuance of a state of war with all the direct or indirect effects which it involves has been previously discussed by this Supreme Court.[2]

" With regard to the alleged judicial interference by the President of the Republic in the dispossession and appropriation of enemy-owned property, it is fitting to note, as this Court has repeatedly held, that the prohibition placed on the President refers exclusively to the matter of his intervening in disputes or cases covered by common civil or penal law ; [3] no such consideration arises in regard to the exercise of the functions which have been granted expressly to the Executive for the effective conduct of war [4] as the basic means of national defense, nor may such exercise jeopardize any of the guarantees granted in Article 18 of the Constitution." [5]

The Court then pointed out that it was not within the province

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[1] *Prov. de Santa Fé* v. *Editor del Diario " La Provincia ", Fallos de la Corte Suprema de Justicia de la Nación*, vol. 167, p. 142.

[2] *Mari, César, ibid.*, vol. 204, p. 418.

[3] *De Hernández, ibid.*, vol. 149, p. 175 ; *Scheimberg y otro, ibid.*, vol. 164, p. 345 ; *Berreta, ibid.*, vol. 169, p. 255 ; *Fasola Castaño, Francisco, ibid.*, vol. 175, p. 182 ; *Frigorifico Anglo (S.A.)* v. *Junta Nac. de Carnes, ibid.*, vol. 185, p. 251 ; *" Mata Grande " (S.A.)* v. *Gobierno Nacional, ibid.*, vol. 195, p. 220 ; *García, Clementina Romeu de, ibid.*, vol. 197, pp. 494–564.

[4] Art. 86, sentences 15, 18, Constitution. *Fallos de la Corte Suprema de Justicia de la Nación*, vol. 149, p. 175, and vol. 175, p. 182.

[5] *Ibid.*, vol. 164, p. 345.

Case No. 129 *Contd.*

of the Judicial Power to express an opinion regarding measures taken in connection with the prosecution of war.

" Summarizing the above discussion, it follows as a logical consequence that only the Executive Power of the Nation, in the exercise of its exclusive war power, had sufficient authority to determine the enemy character of the property of the appellant, the greater or lesser degree of association or relation maintained with belligerent nations, the effect and the gravity which economic penetration by the enemy would import for this country in wartime, and consequently, the convenience or necessity of supervision, control, attachment, and definitive disposition of property, likewise the necessity and urgency of proceeding in such manner as the occasion might demand. Such action could be undertaken without obligation to acquire judicial sanction or to submit the action to legal proceedings.

" These conclusions do not in any way prevent the possibility that when the definitive peace is signed, the parties who consider themselves adversely affected by the measures adopted during the war or limited in the enjoyment of their legal rights may commence legal proceedings designed to secure a modification of the effects of the Government's acts."

[Report : *Diario Jurisprudencia Argentina*, No. 3545 (July 1, 1948).]

NOTE.—A dissenting opinion was filed in which the appropriation of property of enemy origin as a consequence of the war was regarded as violative of the constitutional guarantees and a recommendation was made that the judgment be reversed and remanded to the Court below for further proceedings.

B—WARFARE ON LAND

III.—Occupation of Enemy Territory

i.—Nature and Effects of Occupation

Case No. 130

Belligerent Occupation—Nature and Effects of—Absence of Sovereignty of Occupant—United States Occupation of Island of Okinawa (Ryukyus Group of Islands)—Whether Occupied Territory a " Foreign Country ".

COBB *v.* UNITED STATES.

United States, District Court for the Northern District of California. June 7, 1950.

THE FACTS.—The Federal Tort Claims Act (28 U.S.C.A., ss. 2671–2679), under which proceedings may be instituted against the United States for damages for personal injuries arising from a tort committed, *inter alia*, by persons acting on behalf of a federal agency in an official capacity, specifically exempts from the application of the Act claims arising in a foreign country. The plaintiff, an employee of a private contractor engaged in military construction work for the United States Government on the Island of Okinawa, sustained severe personal injuries when a motor vehicle in which he was travelling collided with a stationary crane which, it was alleged, constituted a danger to traffic, such danger having been caused by the negligence of persons for whom the United States Government was alleged to be liable. The plaintiff accordingly instituted proceedings for damages against the United States Government. Quite apart from the question of whether or not, on the facts, the plaintiff's injuries had been caused by the negligence of persons for whom the United States Government might be held to be liable, the latter contended that the Island of Okinawa, notwithstanding that it was admittedly " in the possession of and under the control of the Army of the United States ", was a " foreign country " within the meaning of the Federal Tort Claims Act, and that the action should therefore be dismissed. The plaintiff, on the other hand, contended that as all Japanese control over the Island had terminated in 1945 and had been replaced by a military government of the United States, Okinawa could not be regarded as a " foreign country " within the meaning of the Federal Tort Claims Act, and that he was therefore entitled to succeed.

Held : that the Island of Okinawa was a " foreign country " within the meaning of the Act, and that the action must be dismissed. The Court said :

" Plaintiff's argument that Okinawa is not foreign country under the Act is based substantially upon the following contentions : it is and since 1945 has been solely under United States Military occupation ; it is not under United Nations Trusteeship nor the Far Eastern Commission ; all Japanese control and government has terminated since 1945 ; Okinawa has no courts, no Diet, no executive branch ; the United States Army supplies the only government which is a military government ; were it not for such military government a void in government would exist in Okinawa ; the United States operates a naval, military and air base on the island and intends to do so indefinitely, various installations described as of permanent character have been and are being constructed by our armed forces, directly and through private contractors.

" Plaintiff places great emphasis upon this language in the report of the Committee on Armed Services, House of Representatives, 81st Congress, 1st Session : ' Okinawa is considered a firm United States Air Force installation that will be continued in use indefinitely. Although the United States' rights

Case No. 130 *Contd.*

to Okinawa have not been clearly defined, it is expected that our tenure there will be of long duration.' Plaintiff's contention, as stated in his brief, is that 'it establishes a present intention of permanent acquisition which, together with actual conquest, has suspended Japanese sovereignty . . . and which has resulted in the creation of American sovereignty'.

"On the other hand the defendant's contention that Okinawa is and has been foreign country is based substantially on the following points: it is a matter of common knowledge of which the court can take judicial notice; that the Secretary of State of the United States has administratively determined it is not a part or possession of the United States; there is no legislature on the island nor has Congress passed any laws in regard to it; the Commanding General of the United States Army merely makes such regulations as he deems advisable; if any law is applicable it is the Japanese law.

"In the evidence is the following communication from the Department of State: 'Okinawa is an island . . . over which Japan has been acknowledged internationally to be the sovereign. . . . No formal determination has been reached concerning the final disposition of Okinawa. . . . It is the view of the Department of State that . . . it is not a territory or possession of the United States.'

"Even in the evidence submitted by plaintiff it is indicated that the view of the Army is that 'The island of Okinawa . . . is occupied enemy territory and under military government', and that 'although the United States' rights to Okinawa have not been clearly defined, it is expected that our tenure will be of long duration. . . .'

"In *Brewer* v. *United States*, D.C., 79 F. Supp. 405, in a well-reasoned and very convincing Federal Tort Claims Act opinion Judge Goodman held Okinawa a foreign territory.

"The opinions in *Brunell* v. *United States*, D.C., 77 F. Supp. 68 and *Straneri* v. *United States*, D.C., 77 F. Supp. 240, while involving other areas, are in general accord with *Brewer* v. *United States*, *supra*.

"Moreover, the recent holding of the United States Supreme Court in the Spelar case, *United States* v. *Spelar*, 338 U.S. 217, 70 S.Ct. 10, 12, 94 L.Ed.—, seems to me to be conclusive. The court said: 'In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected. The present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that will.'

"This court notes judicially that in so far as any law existed in Okinawa at the time of the injury or since such was and is Japanese-enacted law. There are no courts on Okinawa and no law-making bodies. Congress has enacted no legislation therefor—it has only appropriated moneys to make our armed forces more comfortable and effective during an indefinite stay in conquered but foreign territory. Aside from Japanese laws there can only be army regulations which, of course, cannot satisfy the requirement of the Federal Tort Claims Act that the claim must be supported by ' the law of the place where the act or omission occurred '.

" Even assuming the law of Okinawa is no different from that of California (the law of the forum) it must be remembered, as stated earlier in this opinion, that such law as existed in Okinawa is Japanese-enacted law—that is Japanese law.

" Under the Act this suit must be premised on the law of the place where the alleged negligent act occurred. See *Wiltse* v. *United States*, D.C., 74 F. Supp. 786. Therefore, paraphrasing to a degree the language of the *Spelar* decision it must be said ' The present suit, premised entirely upon either Okinawa's Japanese law or upon no law, may not be asserted against the United States '.

" In closing I must acknowledge a great sympathy for the plaintiff and a hope that Congress will by appropriate special act grant him proper relief for the moral obligation which I feel the United States unquestionably owes him.

" But unfortunately for plaintiff, regardless of his moral claim he has no legal claim in this court under the Federal Tort Claims Act."

[Report : 91 F. Supp. 717.]

Occupation of Enemy Territory—Rights and Duties of Occupant—Enemy National in Service of Occupying Power—Negligence of Enemy National—Liability for Damage Caused in Course of Employment. **Case No. 131**

BRITISH ARMY OF OCCUPATION (ROAD ACCIDENT) CASE.

Germany (*British Zone*), *Supreme Court. June* 16, 1950.

THE FACTS.—A German national was employed by the British Army of Occupation as a driver, and as a result of his negligence in driving a British service motor vehicle the plaintiff's horses and cart were damaged, and the plaintiff himself suffered personal injuries. In an action for damages by the plaintiff against the driver it was contended on behalf of the latter that, as he was acting in the course of his employment with the occupying Power, he was not personally liable for the consequences of his negligence.

Held : that the damage caused by the driver was the result of his negligence, and not of the occupation of German

Case No. 131 *Contd.*

territory, and that, therefore, the ordinary principles of German law were applicable which provided for the personal liability of the driver. The Court said:

"The decisive ground on which the court below relies in support of its view is that the legal consequences of the accident are to be judged in accordance with the principles of international law. . . . According to this view damage of this nature does not result from negligence, but from the military occupation of Germany. . . . The danger inherent in praying in aid principles of international law results in the fundamental structure (of the case) being shifted and misunderstood. Generally speaking, international law governs the legal relations between States and not between individuals. Where a German causes damage to another German, the legal consequences are governed by German law unless that law has been abrogated or has declared itself to be inapplicable. It is true that the car driven by the defendant was being used on behalf of the occupying Power—to this extent it is correct to say that the occupation of Germany was a contributory cause of the damage—but the decisive factor was the negligence of the defendant which is alleged by the plaintiff and which must, for the purposes of this appeal (on a point of law), be assumed. The parties are agreed that the civil law does not automatically cease to operate as a result of the occupation, and that the Hague Regulations do not apply here. . . .

"The legal relations between the parties are based on the act of negligence which has been committed. The principles of international law are of significance with regard to these relations only in so far as they might possibly negative the illegality of the act. In the present case we need not consider the extent to which an express order of the occupying Power is capable of having this effect. Such an order might become material in cases where goods are requisitioned or liberty curtailed, and with regard to street traffic, where accidents are caused by an express order to exceed the speed limit or to use a street closed to traffic, perhaps also where a member of the army of occupation who is a passenger in the vehicle has expressly ordered or acquiesced in the overtaking of another vehicle, which overtaking caused the accident. In such cases it might be argued that the occupying Power intended to absolve the driver in its employment, by means of an individual order, from observing the traffic regulations. In the present case, however, no evidence has been adduced that the order given to the driver by the British officer had any such significance. This contention, therefore, cannot exclude the liability of the defendant. . . ."

[Report: *OGHZ*, IV (1950), 26.]

Occupation—Rights and Duties of Occupant—Respect for Local Law—Jurisdiction of Occupation Tribunals—Trial of Member of Legislative Assembly of Occupied Country—Claim to Immunity as Member of such Assembly. **Case No. 132**

LANDWEHR *v.* DIRECTOR OF PROSECUTIONS.

Germany (*British Zone*), *Control Commission Court of Appeal. May* 9, 1950.

(Inglis C.J.; Corrie and Rogers JJ.)

THE FACTS.—The appellant, who was a member of the legislative assembly of the " Land " of Lower Saxony, was also the editor of a newspaper circulating in that " Land ". Certain articles having been published in that newspaper concerning legal proceedings pending before a Control Commission Court, the appellant was convicted of contempt of court and sentenced to a term of imprisonment. He now appealed against conviction and sentence, and in so far as concerned his appeal against conviction contended that as a member of the legislative assembly of Lower Saxony he was not subject to the jurisdiction of the Control Commission Courts, it being provided in Article 37 of the Weimar Constitution—which had been made applicable to the Parliament of Lower Saxony—that " without the consent of the House of which he is a member, no member of . . . a ' Landtag ' shall during the session have criminal proceedings commenced against him. . . ."

Held : that the occupation authorities were not bound by the law of Lower Saxony unless they expressly subjected themselves to it, and as they had not done so, their courts were entitled to try the appellant without the consent of the " Landtag " ; and that, accordingly, the appeal against conviction must be dismissed. The Court said (*per* Inglis C.J.) :

" The Appellant, being a member of the ' Niedersächsische Landtag ', claims that by virtue of a law passed by the ' Niedersächsische Landesgewalt ' dated 11th February 1947, he was immune from arrest and not subject to the jurisdiction of the Control Commission High Court which punished him for contempt. The law upon which he relies, and the several laws extending the period of its operation, have been duly approved by the Land Commissioner of Niedersachsen and make the following Articles of the Weimar Constitution applicable to the ' Niedersächsische Landtag ' :

> ' 36. No proceedings, judicial or disciplinary, may at any time be instituted against any member of . . . a Landtag

Case No. 132 *Contd.*

in respect of anything said or any vote cast by him in his capacity as a member, and he shall not be answerable therefor except to the House.

' 37. Without the consent of the House of which he is a member, no member of . . . a ' Landtag ' shall during the session have criminal proceedings commenced against him or be arrested for any punishable act unless he has been apprehended at the time of doing the act, or at the latest in the course of the following day.

' The same consent is required for any other restraint of his personal freedom which interferes with the exercise of his functions as a member of the House.

' On the demand of the House of which he is a member, all criminal proceedings against a member of . . . a Landtag and any arrest or other restraint of his personal freedom shall be suspended for the duration of the session.'

" Article 36 can have no application to the present proceedings, because the acts constituting contempt of Court were not done by the Appellant in his capacity as a member of the Landtag.

" As to Article 37, the Occupation Authorities are not bound by the Niedersachsen Law of 11th February 1947 ; and this Court would not be entitled to hold that they were so bound unless the Occupation Authorities had, by some legislation of their own, expressly subjected themselves to that Law. The mere approval of the Law cannot imply that the Occupation Authorities have subjected themselves to it. To hold otherwise would conflict with the various declarations and agreements of the Allied Powers that are evidence of the supreme authority exercised by the Occupation Authorities in Germany. By Article II of Ordinance 68 Control Commission Courts were originally given jurisdiction over ' all persons in the British Zone, except persons, other than civilians, who are subject to Military, Naval or Air Force Law and are serving under the command of the Commander-in-Chief or any other commander of any forces of the United Nations '. A slight alteration of Article II, affecting only certain members of the Allied Armed Forces, was made by Ordinance 68 (Amended 2) ; but we are aware of no other legislation affecting the jurisdiction originally given to the Courts over persons. Moreover the Occupation Authorities have, in the Occupation Statute, reserved to themselves powers for the protection of the prestige and security of the Allied Forces ('Allied Forces ' is a term which includes the Occupation Authorities) ; and in that field few things could be so prejudicial as contempts of Court tending to interfere with the administration of justice by, or the power and authority of, the Occupation Courts.

"The Appellant's claim to immunity from the jurisdiction of the High Court must fail."[1]

[Report: *C.C. Cr. App. R.* 1950, p. 94.]

Occupation of Enemy Territory—Rights and Duties of the Occupant—Order of Occupying Power—Execution of Order by Local Municipal Authority—Non-Observance of Requirements of Local Law—Lack of Jurisdiction of Local Court.

Case No. 133

In re M.

Austria, Constitutional Court. June 21, 1950.

THE FACTS.—The municipal authorities of an Austrian town, on the specific instructions of a representative of the Soviet Army of Occupation, let one M. into possession of certain premises the property of the appellant. In so doing they failed to observe the formal requirements of Austrian law. The appellant now contended that the Constitutional Court had jurisdiction to order M.'s eviction.

Held: that, as the municipal authorities had acted on the specific instructions of a representative of an occupying Power, the Constitutional Court was not competent to exercise jurisdiction in the matter. The Court said:

"In the past the Constitutional Court has carefully refrained, in its jurisprudence, from giving a decision on the merits of a case where the local authority was able to prove, or even provide prima facie evidence, that an instruction given by it was based on a direct order of the occupying Power. In such cases the Constitutional Court has declared itself incompetent, the orders of an occupying Power being outside its jurisdiction. . . . At the hearing of June 21, 1950, the mayor of . . . . . ., who was called as a witness, stated explicitly that the letting into possession of M. was not only based upon a general order of the occupying Power, but was the result of an individual order of the Town Commandant who gave an express verbal order to let the said M. into possession of these particular premises. . . . Accordingly, the appeal had to be dismissed; the Court was incompetent because the order appealed against was the result of a direct order of the occupying Power and therefore removed from the scrutiny of the Constitutional Court."

[Report: *VfGH*, 15 (1950), 138.]

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[1] The judgment then proceeds to deal with the appellant's plea for a reduction of sentence. This part of the judgment is concerned only with facts unrelated to the legal issue before the Court.

Case No. 134 **Occupation of Enemy Territory—Rights and Duties of Occupant—Requisitioning of Property in Exercise of Authority Conferred by Occupying Power—Question of Transfer of Ownership.**

REQUISITIONED TRAILER CASE.

Austria, Administrative Court. December 11, 1950.

THE FACTS.—In March 1945 a trailer belonging to one F. was requisitioned for the benefit of the appellant. The original owner of the trailer, one S., applied to the competent Austrian authority for permission to purchase the trailer from the appellant, but instead of granting this permission the authority concerned requisitioned the trailer and in the exercise of powers conferred upon it by the American military government ordered the appellant to hand the trailer to S. The appellant contended that he had been unlawfully deprived of his property seeing that there was no Austrian law in existence which permitted the confiscation of property, and further because in any event the American military government was not entitled to confer power upon the Austrian authorities to confiscate private property.

Held : (i) that, where a municipal authority acts in pursuance of powers conferred by the military government of an occupying Power, there is no need for municipal legislation authorising the exercise of these powers ;

(ii) that the American military government, as an organ of an occupying Power, was entitled to confer powers of confiscation on the Austrian municipal authorities ;

(iii) that these powers could not be questioned in the Austrian courts. The Court said :

" The appellant attempted to establish the illegality of the content of the decision against which he appeals by contending that confiscation of property against his will is permissible only if provided for in an Austrian federal or state law. He contends that a law on which the present confiscation could have been based does not exist at present ; that the ordinance of the American military government of January 30, 1946, cannot at present be regarded as being a law because it has not yet been published in the proper manner and for that reason cannot be binding upon the Austrian authorities and upon Austrian citizens ; furthermore, that the Austrian authorities were under a duty to investigate the validity of this American ordinance because the ' authority ' (which had been conferred upon the Austrian authorities) could not be valid under the constitution or law of the United States, or under international agreements, or under the Control Agreement of August 28, 1946. He contended further that if this authority was invalid, there was no legal basis for the decisions appealed against, and that accordingly these should have been reversed by the authority concerned as being contrary to law. The Court cannot accept this argument. As it previously pointed out in . . . . . ., the Court regards the ordinance concerned as an enactment which was made by the occupying Power by virtue of its sovereign power, and which is binding upon the Austrian authorities. . . ."

[Report: *VwGH* (*A*), 5 (1950), 1893.]

Occupation of Enemy Territory—Nature of—Voting in Occupied Territory—Whether Tantamount to Voting in a Foreign Country—Loss of Nationality—The Law of the United States of America.

See Case No. 54 (*Brehm* v. *Acheson, Secretary of State*).

Occupation of Enemy Territory—Rights and Duties of Occupant—Orders of Occupying Power—Whether Subject to Scrutiny of Local Courts—Requisitioning of Property—General Order by Occupying Power—Formalities in Discretion of Authorities of Occupied Country—Requirement of Observance of Local Law—Whether Subject to Scrutiny of Local Courts. **Case No. 135**

BILLETING OF TROOPS CASE.

Austria, Constitutional Court. March 22, 1950.

THE FACTS.—The appellants complained that an order by the Austrian police authorities requisitioning their property as a billet for the troops of one of the occupying Powers did not satisfy the formal requirements of Austrian law. They contended that the Austrian Constitutional Court was competent to determine whether or not these requirements had been observed.

Held: for the appellants. Where an occupying Power merely issues a general order requesting the local authorities to requisition property suitable for billeting troops, and leaves it to these authorities to select such property, the local courts are entitled to determine whether the selection has been made in accordance with the requirements of local law. The Court said:

" First, the Constitutional Court has to determine the question of its competence. If the occupying Power had given a binding order to the authority concerned specifically to requisition the property of the appellants . . . then the eviction order would, in effect, have been an order of the occupying Power and as such not subject to the scrutiny of the Constitutional Court. In that event the Constitutional Court would have had to reject the appeal for lack of jurisdiction.

Case No. 135 Contd.

"The authority concerned, however, stated that the case under review was entirely different. The occupying Power had merely given a general order to the district police to find a suitable billet and had left the selection thereof to the authority concerned. The latter was, of course, bound to obey the order of the occupying Power, but in executing the order it was bound to use the legal means and observe the form prescribed by Austrian law. These are provided for in . . .

"The authority concerned, however, failed to use the means so prescribed and to observe the procedure laid down for the implementation of the order of the occupying Power, and contented itself with issuing verbal instructions to the appellants ; these instructions lacked any legal basis, both as regards the requirements of substantive law and those of form. Accordingly the instructions amounted to an illegal and unconstitutional encroachment upon the property of the appellants. The Constitutional Court therefore had to find that the constitutionally guaranteed rights of the appellants had been violated by the instructions they received. . . ."

[Report : *VfGH*, 15 (1950) 32.]

Case No. 136

Belligerent Occupation—Nature of—Contracts Entered into on behalf of Municipalities for the Purposes of the Belligerent Occupant—Contracts Entered into with Government Officials on behalf of the State during Enemy Occupation—How far Binding on the State after Liberation—Article 43 of the Hague Regulations of 1907—Acts of Provincial or Municipal Authorities.

ROHDE *v.* RHEDEN.

Holland, District Court of Arnhem. July 20, 1950.

THE FACTS.—In January 1945 the municipal authorities of the town of Rheden contracted to carry out certain installations at a villa at Velp to enable it to be used as a Security Service prison for the purposes of the German occupation authorities. After the war the municipality refused to pay for the work done, basing its refusal on the judgment of the Court of Cassation in the case of *Zeeuwsche Hypotheek-Bank Ltd.* v. *State of the Netherlands*.[1]

Held : that the municipality must pay the contractors. The *Zeeuwsche Bank* case was not in point. The Burgomaster of Rheden had in this instance acted as a regular organ of the municipality. In the case of contracts entered into by Secretaries General in the name of the State, these officials acted in their official capacity after the supreme central administrative authority over occupied Holland had passed from the national Government into the hands of the Occupant. No such situation had, however, arisen with regard to the municipalities; in those territorial units authority had never passed to any other body, not even after the reorganization of their administration by the German Occupation Ordinance No. 152 of 1941. This differing legal position of the municipalities was in accordance with Section III of the Hague Regulations of 1907, and cases such as that under consideration must similarly be distinguished. As a result, the municipality was prima facie bound by the acts of its legal representatives performed during the occupation, whatever their object. If, however, they could prove that the contractors had been aware of the real object of the work to be carried out in the villa, the contract would, on the applicable principles of private law, have been void for illegality. (Cf. *Annual Digest*, 1947, p. 253, n. 1.)

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[1] Decided on January 30, 1948 : see *Annual Digest*, 1948, Case No. 188.

[Report: *N.J.*, 1950, No. 772.]

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Belligerent Occupation—Legislative Measures of the Occupant—Criminal Offence by National of Occupied Country—Right of Military Commander to Disregard Local Law—Right to Enact Special Legislation—Applicability of Specially Enacted Laws and of System of Law of Occupying Country. **Case No. 137**

UNITED STATES MILITARY GOVERNMENT *v.* FLAMME.

Germany (American Zone), U.S. Military Government Court of Appeals. March 27, 1950.

THE FACTS.—The appellant, a German national, having been found guilty of a violation of Military Government Ordinance No. 1, Article I, section 7, " in that he did with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill . . . . . . , a member of the United States Army ", appealed against his conviction and contended, *inter alia*, that the charge should have been laid under German criminal law and not under legislation enacted by the American military authorities.

Held: that the conviction must be upheld. (1) A military commander is entitled to disregard local laws and to enact such legislation as he considers necessary in the interest of the safety of the army of occupation. Accordingly, the charge in the present case had been rightly laid under legislation so enacted, and the appeal must be dismissed;

Case No. 137 ***Contd.***

(2) The courts of an occupying Power, when applying such legislation, are entitled also to apply the principles of their own law, viz., in the present case, of the common law " embracing that great body of unwritten law, founded upon general custom, usage, or common consent, and based upon natural justice or reason ". The Court said :

" The jurisdictional scope of MG Ordinance No. 1 has been before this Court in a number of cases. Among these was the case of *U.S.M.G.* v. *Ybarbo* [1] wherein the Court held that Sec. 7, Art. I, MG Ordinance No. 1, denouncing the offence of killing a United States soldier, did not apply to his civilian dependent and sustained a conviction of the defendant under Sec. 212 of the German Criminal Code. In the case of *U.S.M.G.* v. *Goldner*,[2] the conviction of the defendant for the possession of and of an attempt to utter United States Military Payment Certificates, in violation of Sec. 27, Art. II, MG Ordinance No. 1, was affirmed upon the reasoning that although he was a United States civilian, the act might seriously weaken the economic structure of the United States Area of Control in Germany and was, therefore, a threat to security. In our former opinion in the present case, we recognised a distinction between the amenability of a United States civilian dependent and a German national to MG Ordinance No. 1, expressly holding the ordinance applicable ; but held that, nevertheless, if an attack resulting in homicide was not induced by the fact that the victim was a member of the Allied Forces, the constituent elements of murder should have been alleged. The intent of the ordinance is expressed in the preamble thus :

> ' To provide for the security of the Allied Forces and to establish public order throughout the territory occupied by them '.

" In the *Ybarbo* case *supra*, the learned Chief Justice pointed out that in the occupation of the Rhineland, General Pershing promulgated an analogous ordinance, expressly applicable to the inhabitants of the occupied territory only. He further observed that when Ordinance No. 1 was adopted, ' the civilians in Germany were either subject to Military law, were indigenous, or were citizens of neutral countries ' ; and observing that ' crimes generally recognised by civilised peoples as such, become especially serious and aggravated when directed against the members of the occupation forces ', he stated :

> ' It is proper, therefore, that such crimes be lifted from their usual place in the Criminal Code of the occupied country and more severely punished when they involve the unauthorised use of firearms or armed attacks or resistance

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[1] (1949) I C.A. (USMG), 207 ; *Annual Digest*, 1949, Case No. 160.

[2] (1949) II C.A. (USMG), 144 ; *Annual Digest*, 1949, Case No. 161.

> to the invading forces, or killing or assaulting members of such forces. . . .'

" Perhaps a more direct act in violation of the security of the Allied Forces was that involved in *U.S.M.G.* v. *Mokros et Al.*,[1] which involved riot against the local and military police. However, whether it be a concerted action in resistance to constituted authority or an attack upon an individual member of the Allied Forces, we consider it appropriate that the charge be laid under the law peculiarly defined for the security of such forces. But, as we have said before, if a killing involves the essential elements of murder, these elements should be alleged. Actually, there is no real basis for complaint, for the charge embodies the constituent elements of the charge of murder, at least as prescribed under the German law as it existed prior to 4 September 1941, and the death penalty was not imposed.

" The insistence was made below that the common law should not apply but that, under Article 43 of the Hague Convention, the existing law of the occupied territory should be respected by the occupying nation. This particular Article provides as follows :

> 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

" It has become rather generally recognised by authorities on international law that a Military Commander of an occupation force may make changes in the local laws 'necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war'.[2] A Commander usually does, but is not obliged to, maintain local courts and laws. The ' Rules of Land Warfare ', promulgated by the War Department (U.S.), recognise this, wherein it is stated : 'The military occupant may suspend existing laws and promulgate new ones when the exigencies of the military service demand such action.' It is further provided :

> ' The occupant will naturally alter or suspend all laws of a political nature as well as political privileges and all laws which affect the welfare and safety of his command. . . .
>
> ' An occupant may create new laws for the government of a country. He will promulgate such new laws and regulations as military necessity demands. In this class will be included those laws which come into being as a result of military rule ; that is, those which establish new

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[1] (1949) II C.A. (U.S.M.G.), 102.

[2] See Oppenheim's *International Law*, vol. ii (6th ed., 1944), p. 349.

Case No. 137 Contd.

crimes and offences incident to a state of war and are necessary for the control of the country and the protection of the army.'

" The authority, under the Laws of War, for changes in the local law, and notably in connection with the German occupation of Belgium, was under consideration by mixed tribunals subsequent to World War I, and demonstrates the diversity of questions which may arise.

" A decision of the British Control Commission, Court of Appeals (*Richard Pahl* v. *The Director of Prosecution*, CC. Cr. App. R. (1948) 74, at 78) is cited as holding that the British common law should not be adopted into the jurisprudence of Military Government courts, unless expressly provided in a Military Government law. What the Court said was this :

> ' We agree that, except where a British subject is charged under provisions of English law expressly adopted by Military Government legislation as applicable to British subjects, English law is quite distinct from Military Government law. It is often necessary, however, for Courts applying Military Government law to state principles or rules regulating the application or interpreting the written provisions of that law. In formulating such rules or principles the Courts are not bound to adopt any particular law, English, German or any other, but should act upon principles which are just, logical and have due regard to the circumstances and conditions in which the particular Military Government law has to be administered. In some cases it may be appropriate to follow English legal principles ; in others German principles may be preferable ; in yet others the formulation of entirely new principles may be necessary. But when it is necessary for a Control Commission Court to enunciate some principle or rule for the interpretation or application of Military Government law, that principle or rule should always be fully set out and not stated merely by reference to English law, German law or any other system of law.'

" We do not find the foregoing statement to be at all inconsistent with the adoption of principles of common law."

[Report : (1950) VIII, C.A. (U.S.C.) (A.H.C.) 365.]

Belligerent Occupation—Legislative and Administrative Powers of the Occupant—Requisitions—Conditions of—Hague Convention No. IV of 1899—Whether Binding upon Italian State—Whether Part of Italian Law. **Case No. 138**

COLORNI *v.* MINISTRY OF WAR.

Italy, Court of Cassation. March 22, 1950.

THE FACTS.—During the occupation of Rome by German troops after the break between Italy and Germany following the overthrow of Mussolini, the German authorities seized a motor car belonging to the Italian army and sold it to one Maceori, from whom the respondents acquired it. After the end of the war the Italian authorities claimed the car. The Court of First Instance dismissed the action on the ground that the seizure was valid in virtue of Article 53 of Hague Convention IV which formed part of Italian law, and that title had passed to the subsequent purchaser. The Court of Appeal of Rome[1] reversed the judgment on the ground that Hague Convention IV was not applicable as regards persons and objects in Italy and that the Italian Government was at liberty to make provision for the return of objects seized by the enemy. Article 53 of Hague Convention No. IV of 1899 provided:

" An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations of war. . . ." Upon appeal to the Court of Cassation:

Held: that the judgment of the Court of Appeal of Rome must be confirmed, but on other grounds. The Court said:

" Contrary to the view expressed by the Court of Appeal, the rules of the Annex to the Second Hague Convention concerning the laws and customs of warfare on land of 29 July 1899, brought into force by the Italian Government by Royal Decree of 9 December 1900 in relation to the Governments which have ratified the Convention, must be regarded as incorporated into Italian law. This applies, in the present case, to the provisions of Articles 52 and 53 of the Convention. These were first laid down in the Declaration of Brussels of 27 August 1874 and were reproduced without alterations in the Regulations annexed to the Fourth Hague Convention of 18 October 1907, which was not ratified by Italy. The latter were not formally incorporated into Italian law in virtue of legislation. However, the Royal Decree of 9 December 1900 which approved and rendered executive in Italy the provisions of the Second Hague Convention of 1899 did confer upon the latter the character of Italian law. It purports formally to give force to the International Convention and cannot be regarded merely as laying down general principles of Italian law limiting the rights of the Italian State in respect of its own property and of that of Italian nationals. These rules form undoubtedly part of customary international law. Even in the absence of a treaty to this effect between the various States, these rules govern the activities of States in time of war. In particular, they govern the conduct of the command of the armed forces of an occupying State in relation to the nationals of the occupied State, whether they be individuals or legal entities, in so far as their property and its use are concerned. In this manner the belligerent needs of the occupying forces are reconciled with the fundamental requirements of the occupied State.

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[1] *Foro Italiano*, 71 (1948), I, 533; *Annual Digest*, 1948, Case No. 182 (*sub nom. Ministry of War* v. *Colorni and Fattori*).

" Italian municipal law was bound to adapt itself to these rules. The reason is not the supremacy of international law, whether it be customary or embodied in a treaty. The reason is that it is inconceivable that a State, in its capacity of a subject of international law, should assume obligations which are imposed upon it by international law in relation to other States and then take up a conflicting attitude in its own municipal law and in relation to its own nationals. There exist thus overriding principles based upon the need to secure mutual existence among civilized States, and between the latter in relation to their nationals and to nationals of States which are occupied for reasons of belligerency. These principles applied already before they were embodied in Article 10 of the Italian Constitution which provides: ' Italian law conforms to the generally recognized principles of international law.' They require that Italian municipal law must conform to customary international law and thus to the rules set out in Article 53 of the above-mentioned Convention, in so far as requisition by the armed forces of occupying States in the territory of occupied States is concerned as well as in respect of booty.

" But the principle of international law as formulated in the first paragraph of the said Article does not bear the meaning which the appellant wishes to attribute to it. He argues that the occupying State may appropriate the means of military transport which are the inalienable property of the Italian State subject to occupation, not only for the purpose of warlike operations, inasmuch as these means of transport are means for carrying on war, but also for the actual purpose of carrying on commerce with Italian nationals themselves.

" This argument is met by the rule of Italian municipal law to the effect that Italian nationals cannot acquire objects (such as military motor vehicles which are beyond doubt included among arms) if they form part of the inalienable property of their own State. . . . It is impossible to interpret the above-mentioned rule of international law in a sense which would confer such wide powers upon the armies of the occupant. Nor is it possible to contend that Italian municipal law would accept such a far-reaching restriction in relation to its own nationals. To accept the appellant's contention would mean not an adaptation of municipal law to the requirements of international law, nor an attempt to adjust the rules of both. In fact it would create friction between the two legal systems and would lead to the defeat of the rules of Italian municipal law, even in a sphere governed by rules which cannot be abrogated by nationals and private persons in general. Instead, absolute precedence would be given to what the appellant contends are the rules of international law, with effects which would operate even after the occupation has come to an end and the lawful Government has been restored. This interpretation is arbitrary and is contradicted by clear rules of Italian municipal law. It is arbitrary for the following reasons: Article 53 of the Regulations annexed to the Second Hague Convention expresses the principle of international law as it has been generally recognized. It limits the power of the 'army of occupation' to taking possession or, as the text of the regulation provides literally, 'to take possession of the cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all moveable property of the State which may be used for operations of war'. This means that the objects may be seized in so far as they serve, or are intended for, the purpose of warfare or of belligerent operations. They must never be seized in order to conduct trade with the local inhabitants. The latter cannot, therefore, rely on Article 53 in order to show their title or on any ground justifying the acquisition of property in the objects in question. . . ."

[Report: *Foro Italiano*, 73 (1950), I, 829.]

NOTE.—See also *Agati* v. *Società elettr. coloniale italiana*, decided on November 20, 1950, by the Court of First Instance of Tripoli, where the Court said, with reference to the appointment of a Custodian of Italian property by the Allied Military Government: "The international Conventions of The Hague, to which the more civilised States have adhered, lay down that requisitions may only be made for the requirements of the army of occupation. It cannot, however, be overlooked that, especially during the recent conflict, States have applied some principles of international law either more restrictively or more extensively. This may have been done for the reason that new belligerent requirements have arisen or that war has become total. Its horrors do not spare towns and their inhabitants. Thus the need arises for making provision to ensure the elementary needs of livelihood of the population of the occupied territories. It has

Case No. 138 Contd. happened, also, that in keeping with the change of international law some States have developed new institutions, while remaining faithful to the humanitarian principles which inspired the Hague Conventions. Such institutions may be akin to requisitions. Thus in Africa custodians of the property of the enemy State were appointed, and in Italy immoveables and factories belonging to enemies were placed under control. The reason was, in the words of the Proclamation of the Allied Military Government of September 12, 1943, No. 6, that they were 'essential for the needs of the armed forces and of the inhabitants of the occupied territories'. Consequently, it may be said that the placing of property under a custodian or under control has the same effect as an act of requisitioning. It makes no difference that the property so placed in custody or under control is partly intended . . . for the use of the inhabitants.

"It is true that the courts of the occupied State have occasionally examined the requisitioning orders of the occupying Power, in order to determine whether these orders were in accordance with Article 52 of Hague Convention IV. However, such an examination concerns the legality of the order, whether it is unduly oppressive or whether it serves non-military purposes. Its effects do not involve the responsibility of the occupying Power. It concerns acts from which a private individual derived unjustified benefits to the detriment of the former owner of the requisitioned object. . . ." [Report: *Foro Italiano*, 74 (1951) I, 249.]

Case No. 139

Belligerent Occupation—Legislative and Administrative Functions of the Occupant—Requisitions for Benefit of Occupied Country—The Law of Italy.

Comune Di Capaccio *v.* Lombardi.

Italy, Court of Cassation (*United Civil Sections*).

October 9, 1950.

In this case the Court *held* that the requisitioning of a private motor car by the Allied Military Authorities for the purpose of safeguarding the services of the administration of an Italian town was an act done by the Allied Military Authorities on behalf of the Italian Government, and not on their own behalf. The act of requisitioning was therefore governed by Italian law and not by international law. The Court said:

"The act of requisitioning is thus equivalent to one ordered by the Italian State. It differs from requisitions for their own purposes by the Anglo-American forces which fought in Italy during the last war. It differs also from the requisitions carried out by the German military forces in the Italian territories occupied by them. As the United Sections of this Court have recently held in a decision of 11 March 1950,[1]

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[1] *De Riard* v. *Medoro*. See *infra*, Case No. 141.

Italian law does not govern this type of requisitioning. For the Anglo-American requisition, a special jurisdiction of administrative officials was established.[1] The German requisitions are governed by international law and more particularly by the rules annexed to the Hague Conventions of 1899 and 1907, provided always that the acts of requisitioning were in accordance with these Conventions. In the above-mentioned cases of requisitions by the Anglo-American and German military authorities for their own requirements the requisitions did not serve any needs of the Italian State. On the other hand, as the judgment of 11 March 1950[2] has pointed out, the provisions of Italian law concerning requisitions envisage solely acts of requisitioning carried out by Italian authorities for the purposes of the Italian State. In the present case it cannot be denied, despite the outward circumstances, that the requisitions served the needs of the Italian civil authorities. The authorities which ordered them were foreign, but they replaced the Italian authorities *de facto*, and after the armistice *de jure*. Moreover, the continuation of the requisitions was ordered by the Prefect of Salerno, an Italian authority. Consequently, the requisitions in question must be treated like requisitions ordered by the central authorities of the Italian State. They are governed by the basic Decree of 18 August 1940, No. 1741, as amended subsequently. . . ."

[Report: *Foro Italiano*, 73 (1950), I, 1281.]

NOTE.—Compare *Bracale* v. *Amministrazione del Genio Militare*, decided on July 12, 1950, by the Committee for Requisitions in the Campania, Abruzzo and Molise [Report: *Foro Italiano*, 73 (1950), I, 1379]. See also *Zito-Scalici* v. *Fontani*, *Annual Digest*, 1948, Case No. 208, and the decisions cited in the Note thereto.

Belligerent Occupation—Legislative Functions of the Occupant—Legislation Contrary to the Hague Regulations, 1907.

See Case No. 143 (*De Coene* v. *Town of Courtrai and Belgian State*).

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[1] The Court referred to the Legislative Decree of May 21, 1946, No. 451.

[2] *De Riard* v. *Medoro*. See *infra*, Case No. 141.

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Case No. 140 **Belligerent Occupation—Respect for Private Property—Failure of Occupant to Make Payment for Requisitioned Real Property—Claim by Owner against Government of Occupied Country——Nature and Admissibility of Claim.**

MELKUS AND ANOTHER *v.* REPUBLIC OF AUSTRIA.

Austria, Supreme Court. November 24, 1950.

THE FACTS.—The plaintiffs were the owners of a house in Vienna. One of the flats forming part of that house was requisitioned by one of the Occupying Powers, and no rent having been paid for its user, the plaintiffs brought an action for payment of rent against the Austrian Government. The Court of First Instance having given judgment for the Austrian Government, and the Court of Appeal having reversed the Court of First Instance, the Austrian Government now appealed. It was contended on behalf of the respondents to the appeal that the gratuitous user of their property by the Occupying Power constituted a service rendered by the owners which, under international law, should have been rendered by the Republic of Austria and that, accordingly, the latter was liable to pay rent to the respondents. On behalf of the appellants, the Austrian Government, it was contended that the Occupying Power was entitled, by virtue of the occupation, to exact services from private individuals, and that the respondents were not entitled to claim payment in respect thereof from the Austrian Government.

Held : that (i) the fact of occupation as such conferred upon an Occupying Power the right to demand that services be rendered by private individuals, and that such services were not rendered on behalf of the Government of the occupied territory ;

(ii) accordingly, the Austrian Government was not liable to pay the rent which the Occupying Power had failed to pay, and the appeal of the Austrian Government must be allowed and the judgment of the Court of First Instance restored. The Court said :

" The submission contained in the statement of claim that the plaintiffs have rendered to the Occupying Power a service which, by virtue of international law, was the sole liability of the Republic of Austria is ill-founded. Burdens were imposed upon Austrian citizens not by virtue of the recognition, on the part of the Republic of Austria, of the rules of international law, but by virtue of the occupation of Austria. It is solely the fact that the whole territory of Austria has been occupied—and not the Hague Regulations of 1907—which confers upon the Occupants the right to levy requisitions in kind and to exact services from municipalities as well as from individual citizens, irrespective of whether or not such requisitions are in conformity with the provisions of Article 52 of the Hague Regulations. The Republic of Austria is not in a position to exercise any influence upon the Occupying Powers to comply with the provisions of the Hague Regulations and to pay cash for requisitions levied by them (Article 52, paragraph 3, of the Hague Regulations) ; for, although the sovereign power of the Republic of Austria continues to exist without limitations while the country is under occupation, subject to such exceptions as may result from Article 1 of the Control Agreement, there is superimposed upon it the sovereign power of the Occupants (see Verdross, *International Law*, second edition, p. 360 *et seq.*), every one of whom is in a position to exercise full authority in fact within his own zonal territory.

" If the Austrian Government is under a duty to submit to the restrictions resulting from the fact of occupation, then the individual citizen directly affected by the occupation must also initially shoulder the liability for the expenses and burdens connected therewith. It is for the administrative authorities to equalise, within the framework of existing laws, such hardships and inequalities as are caused by the occupation to individual citizens. Full indemnification for persons so affected can only be achieved by action of the legislature. So far no such action has been taken in Austria.

" If, in view of what has been said above, the claim of the plaintiffs for compensation as against the Austrian State cannot be based upon the Hague Regulations, which have been recognised by the Republic of Austria in principle, then there is even less justification for such a claim to be based upon the ' Law relating to the Payment of Occupation Costs ' (BG Bl. No. 133/49) which, as the notice of appeal rightly points out, is in the nature of a revenue law and as such part of administrative law. The costs of occupation imposed upon the Austrian people constitute contributions for the benefit of the Occupying Powers. For the reason set out above, the Republic of Austria is unable to exercise any influence upon their imposition or use. The liability to pay these costs results from the fact of the occupation of Austria. The Republic of Austria is under no civil liability to pay compensation for the user of a requisitioned flat of an Austrian citizen, where the Occupying Power has refused to make payment. Nor can such civil liability be derived from the ' Law relating to the Payment of Occupation Costs ', which provides for the raising of the occupation costs imposed upon the Austrian people, in the absence of other means of raising moneys, in such manner

Case No. 140 *Contd.*

that in principle every person liable to taxation is bound to pay a contribution.

"The fact that the proceedings may base the claim upon the provisions of civil law of the Civil Code (AB GB) cannot in any way alter the nature of the claim, which alone is material in relation to the legal channels which are permitted.

"The claim for compensation as such falls within the province of administrative law; it is not only the decision relating thereto which depends upon the solution of a preliminary problem of administrative law. Therefore, the claim cannot be asserted by means of the channels of civil law.

"Accordingly, the appeal must be allowed and the decision of the Court of first instance restored."

[Report: 2 Ob. 751/50.]

Case No. 141

Belligerent Occupation—Respect for Private Property—Requisitions—Conditions of—Article 52 of the Hague Regulations.

De Riard *v.* Medoro.

Italy, Court of Cassation (*United Civil Sections*).
March 11, 1950.

The Facts.—In the course of their occupation of Italian territory, the German armed forces requisitioned in regular form a cow belonging to the respondent and subsequently disposed of it to the appellant in return for another cow. In an action brought by the respondent against the appellant to recover the cow on the ground that the appellant had not acquired title according to Italian law, the Court of First Instance of Chieti [1] gave judgment against the respondent. The other relevant facts are stated in the *Held* below. The Court of Appeal of Aquila reversed this decision.[2] Upon appeal to the Court of Cassation,

Held: that the judgment of the Court of First Instance of Chieti must be restored. The respondent had lost title in the cow in virtue of the act of requisitioning, which was lawful according to international law. The Court said:

"The objection of the respondent is not well founded. The rules of Italian law concerning requisitions are inapplicable where requisitions were carried out by foreign armies fighting in Italy during the last war."

The Court examined the relevant provisions of Italian law and continued:

"In the opinion of the Court of Appeal, the mere fact that the cow was requisitioned in proper form did not render the requisition valid. According to the Court of Appeal it was necessary to examine whether the exchange by the Germans of the respondent's cow for the appellant's cow was capable of transferring title from the former to the Germans and by the Germans to the latter. The Court held that, according to Italian law as well as according to customary and conventional international law, requisitions are allowed in so far as these are intended to satisfy immediate needs by putting the requisitioned object in direct use for these purposes. The Court concluded, therefore, that a requisitioned object may be used and consumed in its natural state, but that it cannot be sold or exchanged for another. It was irrelevant that the ultimate purpose remained to satisfy the original needs. The Court held, accordingly, that in the present case the exchange was void and that the appellant had never acquired ownership in the cow of the respondent. It made no difference that the appellant had given in exchange another cow of his own (used for work only), seeing that he knew the legal position of the milking cow which he received in exchange from the Germans and had freely taken the risk.

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[1] *Foro Italiano*, 71 (1948), I, 372, reported in the Note to *Giovannini* v. *Renzi*, *Annual Digest*, 1948, Case No. 209.

[2] Unreported.

" It must be noted that the following facts were found by the Court below. The cow was requisitioned by a Commission which was set up by the German forces of occupation. The Commission consisted of the mayor of the locality, as president, the Veterinary Officer of the commune, some other Italian officials, and two German non-commissioned officers. A census was taken of the animals in the fields, the animals to be requisitioned were selected, weighed and valued, and the owners were given receipts indicating the amount of compensation due to them. It appears that, to save the livestock as far as possible, the Italian authorities contrived that primarily beasts of draft and burden were requisitioned, and not cows in milk or used for calving. When this was impossible they permitted, with the consent of the German non-commissioned officers, the owners whose cows had been requisitioned to exchange them for others.

" The cow of the respondent was requisitioned in accordance with these formalities. As stated before by this Court, the question whether it was lawfully requisitioned must be considered not in accordance with Italian law (which is inapplicable), but according to international law. More particularly, it must be examined in the light of the Annex to Hague Convention IV of 1899 and of the Annex to the Convention of 1907. These Conventions must be observed by the laws of the various countries, either because the individual States have ratified them or because they represent rules of customary international law, provided always that the requisition in question complies with the conditions laid down in these Conventions. Article 52 of both Conventions permits the occupying forces to

Case No. 141 *Contd.*

make for their own needs requisitions in kind or in services of bodies and individuals in the territory. In this connection, Article 52 lays down, *inter alia*, that the requisitions must be exclusively for the needs of the army of occupation. They must be in proportion to the resources of the country, and can only be demanded on the authority of the Commander in the locality occupied. Moreover, supplies in kind must, as far as possible, be paid for in ready money ; if not, their receipt must be acknowledged, and payment is to be made as soon as possible. All these conditions were fulfilled in the present case. . . . The cow was requisitioned for the purpose of feeding the German army.

" Moreover, the requisition was not only valid in form but also in substance. The following conditions must exist for an act of requisitioning to be lawful. There must be grave and urgent public need. If the requisition is made by an army of occupation, it must serve strictly the requirements of the army. The goods or services must be suitable to satisfy these requirements. Adequate compensation must be paid. It is thus indispensable that the requisitioned object be suitable for the purpose for which it is requisitioned. The cause of requisitioning coincides with that of the urgent requirement and with the suitability of the objects to satisfy these needs. Only if the requisition fulfils these conditions can the sacrifice demanded from the individual who suffers the requisition be justified.

" Although the Court below did not consider the suitability of the object, the appeal must succeed on this ground. The cow of the respondent, which was the object of the requisition, was well suited for the purpose for which it was requisitioned. It was to serve as a provision for the German Army, and could well be transported to the North of Italy. It is true that a working cow might have been better for this purpose. The proposal to exchange the cow of the respondent, which had been requisitioned, for a working cow did not emanate from the German requisitioning authority, but from the Italian members of the Commission. The purpose was to save a milking cow for the use of the civil population. This was done by the Italian members whenever a milking or cow in calf was requisitioned. . . . The Court of first instance has found that the proposal to exchange one cow for another was made ' with the express or tacit consent of the German military authorities ', . . . It is clear that if the exchange had not taken place, the Germans would have carried the cow of the respondent to the North although she was in milk, seeing that they could use her equally well, be it only by slaughtering her before any others. The exchange of cows was therefore an irrelevant fact. The appellant De Riard, who obtained the cow belonging to the respondent Medoro with the approval of the Requisitioning

Commission, certainly acted in good faith . . . and acquired title. . . .'

[Reports: *Foro Italiano*, 73 (1950), I, 1317, with a note by Capotorti; *Giurisprudenza Italiana*, 103 (1951), I, 1, 49.]

Belligerent Occupation—Requisitions and Contributions—Article 52 of the Hague Regulations—Absence of Requisition Order. **Case No. 142**

VAN BEGGELAER *v.* BELGIAN STATE.

Belgium, Court of Cassation (Second Chamber.)
March 27, 1950.

THE FACTS.—The appellant was convicted on November 24, 1949, by a Military Court of Appeals of having given aid and assistance to the enemy in violation of Article 115 of the Penal Code in that he built sanitary installations and huts for the enemy. The Court found that while the services rendered to the enemy by the appellant—which were paid for by the Belgian communes—fell amongst those which the occupant was by Article 52 of the Hague Regulations entitled to require of the civil population, this could not constitute a defence since the appellant had acted in pursuance of a contract voluntarily concluded with the enemy. It was now contended on behalf of the appellant that the Military Court of Appeals had misapplied Article 52 of the Hague Regulations, and that any act falling within the framework of that Article was not punishable under Article 115 of the Penal Code.

Held: that the appeal must be dismissed. Article 52 of the Hague Regulations could only be invoked if the appellant had acted in pursuance of a requisition order. The Court said:

"The lower Court held that the appellant would not have committed a legally punishable act if he had executed the work in question in pursuance of a requisition by the enemy. It found that the appellant had not been served with a requisition order either by the enemy or by the communal authorities. In deciding that assistance to the enemy which is provided for by the Regulations appended to the Hague Convention of 18 October 1907, approved by the Belgian law of 25 May 1910, does not fall under Article 115, paragraph 2, only if it is given in pursuance of a requisition order provided for in these Regulations, the Court correctly applied these provisions."

[Report: *Pasicrisie belge*, 1950, I, p. 527.]

Case No. 143 **Belligerent Occupation—Respect for Private Property—Requisitions—Authorities Responsible for Payment—Legislative Functions of the Occupant—Legislation Contrary to the Hague Regulations, 1907.**

De Coene *v.* Town of Courtrai and Belgian State.

Belgium, Civil Court of Courtrai. January 6, 1950.

The Facts.—The plaintiff was the owner of immovable property in Courtrai which was requisitioned during the German occupation. He now claimed compensation in respect of that requisition from the town of Courtrai.

Held : that the claim must be rejected. Only the occupant was liable to pay compensation for requisitions effected by him. The Court said :

" According to the Regulations annexed to the Hague Convention of 18 October 1907, the occupant has the right to make requisitions for the purposes of the army of occupation against payment. Payment must be made by the authority which is responsible for the requisition, namely, the army of occupation, and accordingly constitutes an occupation charge.

" The regulations concerning civil requisitions of 1 February 1938 expressly provide that they are inapplicable to requisitions effected by the occupant or by a national authority acting under the orders or the constraint of the occupant. A requisition by the occupant thus cannot give rise to any rights against a national authority.

" The plaintiff invokes a German ordinance of 17 December 1940 concerning compensation for the occupation of accommodation by the German army in Belgium. The duty of the Court is to apply national laws and regulations and such foreign laws as they are required by national legislation to apply. The ordinance of 17 December 1940, which in disregard of international treaties laid the obligation to pay compensation for the occupation of accommodation by the German army upon the communes . . . has not become part of Belgian law."

[Report : *Pasicrisie belge*, 1950, III, pp. 110–113.]

Belligerent Occupation—Devastation—Burning of Isolated Dwellings.

See Case No. 144 (*In re Haase*).

iv.—Inhabitants. Services. Deportations. Hostages

Belligerent Occupation—Treatment of Civilian Population—Murder—Mass Executions—Mass Arrests as Reprisals—Arson—Resistance Movement in Occupied Country—Legal Position of—Crimes against Humanity. **Case No. 144**

In re HAASE.

Holland, Special Criminal Court (Second Chamber).
June 20, 1949.

Special Court of Cassation. March 20, 1950.

THE FACTS.—After the liberation of Holland in 1945 Bernhard Georg Haase, the former head of the Foreign Section of the German Security Police and Sicherheitsdienst (Security Service) at Groningen, was prosecuted : (i) for having, between November 1942 and March 1945, instituted a reign of terror in the three northern Provinces of Holland by giving a free hand to his subordinates to execute Dutch civilians without trial, or by inciting such acts ; (ii) for having given direct orders for the shooting of Dutch citizens, the mass arrests of innocent people in organized raids, and the wholesale seizure of hostages ; (iii) for having directed the [German] police to carry out, or assist in, mass executions ; (iv) for having ordered the setting on fire of dwelling houses ; and (v) for having permitted a régime of violence against, and ill-treatment of, prisoners. According to the indictment, the total number of deaths which resulted from Haase's activities exceeded 150. He was sentenced to death by the Special Criminal Court. He appealed.

Held (by the Special Court of Cassation) : *inter alia*, that the Court below had, in general, correctly applied the rules of war to the case under consideration, with two exceptions. First, the Court below had been in error in holding, with regard to reprisals against members of the Netherlands resistance movement, that they were entitled to be classed as prisoners of war. The theory that members of such movements, who did not comply with the requirements laid down in Article 1 of the Hague Regulations of 1907 concerning volunteer corps, were entitled to be treated as prisoners of war, found no support in the law of nations as it was in force during the Second World War. This did not, however, detract from the ruling of the Court of Cassation in the *Rauter* case (see *Annual Digest*, 1949, Case No. 193), as to the permissibility or otherwise of reprisals or alleged reprisals, nor from its findings in the *Vogt* case (*ibid.*, Case No. 164) that the Occupant could not lawfully retaliate against acts of resistance provoked by and directed

Case No. 144 *Contd.* against grave violations of the laws of war which he himself has committed. The Court below had therefore reached a correct conclusion, although upon incorrect reasoning. Secondly, the Court below was wrong in treating the setting fire to isolated buildings as a crime against humanity in the sense of Article 6 (*c*) of the Charter of the International Military Tribunal—a finding which could be justified only in very exceptional circumstances, which did not obtain in this case.

[Reports : *N.J.*, 1950, No. 304 ; *N.O.R.*, V, No. 1687.]

Case No. 145 **Belligerent Occupation—Treatment of Civilian Population—Indiscriminate Shooting of Civilians—Right to Trial—Forbidden Zones—State of Necessity—Suppression of Espionage.**

In re LIPPERT.

Holland, District Court of Arnhem (*Special Criminal Chamber*). *May* 12, 1950.

Special Court of Cassation. November 11, 1950.

THE FACTS.—Lippert, a Section Leader of the German "Waffen S.S.", a specialized German military formation, was in command of a certain regiment which was a unit of the German army corps commanded by General Blumentritt. From the middle of February 1945 until the German capitulation of Wageningen, this regiment was in charge of the defence of part of the Rhine front to the west of Arnhem. The region concerned having already been evacuated by the civilian population by order of the German military authorities, it was declared by General Blumentritt to be a "Sperrgebiet" (forbidden zone) and was clearly demarcated. Under an order of the General, entry into the zone was forbidden without a special permit and distinguishing armlets. Unauthorized persons attempting to enter could be shot without previous challenge by sentries. Lippert, however, on his own initiative increased the severity of the General's orders by commanding that any person found within the forbidden zone should be shot, whatever his explanation of his presence there might be, and without trial, even after arrest by a patrol—on the presumption that all persons found in the zone would be spies, saboteurs or terrorists. Under this order a number of Dutch civilians were shot by Lippert's men. On his prosecution after the war for war crimes the accused contended that his orders were in accordance with the laws of war. He also pleaded, *inter alia*, error of law, a state of necessity (of the German Reich), personal *force majeure*, and superior orders.

Held (by the Court below) : that the accused must be convicted. Even if the military situation in 1945 could be deemed to justify military orders authorizing sentries or patrols to fire on persons found by chance in the forbidden area if, in the prevailing circumstances, they could not be arrested, such circumstances could never justify the shooting without previous trial of persons who had been so arrested. Even persons involved in actual espionage in the zone of operations had the right to be tried by a military court ; *a fortiori*, those found in the area and presumed to be there for an unlawful purpose. The mere fact that at this stage of the war, and with the scanty forces at his disposal, a commander was in a very difficult military situation could not excuse such unlawful orders ; the German doctrine of " *Kriegsraeson geht vor Kriegsmanier* " was condemned by the laws of war themselves. Nor could the accused shelter behind superior orders, since it was he who had increased the severity of General Blumentritt's orders, the general terms of which allowed of their being put into execution in such a manner that no rules of warfare would be violated. Similarly, for this and other reasons the accused could not invoke any personal risks which he might have run in case of his failure to comply with Blumentritt's orders.

The accused was sentenced to 12 years' imprisonment. He appealed against sentence, and the Public Prosecutor cross-appealed, asking for an increase thereof.

Held (by the Special Court of Cassation) : that the findings of the Court below were correct in law, but that there were grounds for reducing the sentence to 10 years' imprisonment. To enable a just evaluation of the acts of the accused it was important to bear in mind that they were the orders of the commander of a regiment which, in the early part of 1945, held a sector of the German front lying along broad rivers, within range of enemy artillery fire and constantly involved in combat with the Allied forces. In such a situation the measures initially taken by the superior officers of the accused—evacuation of the civilian population from the fighting area and the setting up of a forbidden zone—were not contrary to the laws of war. The same applied to the orders of General Blumentritt which were in force when the accused took over command of the area, *viz.* that sentries were authorized to shoot civilians caught in the act of trespassing into the forbidden zone provided that the limits of the area and the consequences of ignoring the ban had been clearly made known. The limits of what was permissible were, however, exceeded by the accused, an officer with the rank of commander of a regiment, who increased the severity of the order on his own responsibility so that it entailed the killing on the spot of all individuals met with in the forbidden zone without regard to the circumstances of the case. He even forbade his subordinates to bring such persons to his command post for examination. As a result, a number of civilians who, without any improper motive, had

Case No. 145 Contd. entered the forbidden area had been arrested and executed without trial. Nor had the accused any excuse on the ground of the military necessity of preventing espionage in the front area. According to Article 30 of the Hague Regulations of 1907: " A spy taken in the act shall not be punished without previous trial." There remained only the desperate situation in which the German army found itself in the first few months of 1945 and the fact that the attention of the accused was fully occupied in those days with the command of a regiment in actual combat; and on these grounds the Court ordered the sentence to be reduced.

[Report: *N.J.*, 1951, No. 119.]

Case No. 146

Belligerent Occupation—Treatment of Civilian Population—Ill-Treatment and Killing of Citizens of Occupied Territory—When Justifiable as Reprisals—When Punishable as a War Crime—Claim of Accused to Diplomatic Immunity—Plea of Retroactivity of Law Providing for Punishment—Universal Declaration of Human Rights, 1948.

In re BEST AND OTHERS.

Denmark, Eastern Provincial Court of Copenhagen.
July 18, 1949.

Supreme Court. March 17, 1950.

THE FACTS.—During the German occupation of Denmark, and after the recall of the German Minister from that country, the accused Best was appointed " Reich plenipotentiary " with express instructions not to present his credentials to the King of Denmark. Some time after his appointment, however, he obtained the permission of the German Government to re-establish normal diplomatic relations with Denmark. The accused Pancke was the " Higher S.S. and Police leader ", and the accused Bovensiepen was the " Chief of the Security Service ". All three accused were charged with responsibility for killings and demolitions carried out by German forces in furtherance of the German campaign against sabotage in Denmark. The accused Pancke and Bovensiepen were further charged with the offence of having ordered the so-called " severe interrogation " of Danish citizens, such interrogation involving torture. The accused Bovensiepen was further charged with having ordered the execution, without trial, of eleven Danish subjects. The Court of First Instance having found the accused guilty of the offences charged, it was contended on their behalf, on appeal to the Eastern Provincial Court of Copenhagen, that they were entitled to diplomatic immunity in respect of all offences alleged to have been committed during their tenure of office in Denmark, that the Danish statute which made the alleged crimes punishable offences was enacted subsequently to the alleged commission of the offences charged and was therefore invalid as being contrary to the principle of non-retroactivity of penal laws contained in the Declaration of Human Rights, and lastly, that in any event the alleged offences were legitimate reprisals against acts of sabotage previously committed by Danish citizens, and were therefore not punishable. On behalf of the prosecution, it was contended that as during the war Denmark had no government which was independent of Germany, the accused were not entitled to claim diplomatic immunity, that the offences charged had been committed (the increase of the penalties applicable thereto, which had been enacted by a later Danish statute, being immaterial), and that the offences could not be qualified as legitimate reprisals, on the ground that no prior notification had been given to the Danish population that the crimes charged were intended to be reprisals for previous acts of sabotage.

Held (by the Eastern Provincial Court of Copenhagen) :

(i) that the accused were not entitled to diplomatic immunity;

(ii) that the Danish statute which provided for increased punishment for the offences charged was not inapplicable as violating the rule against non-retroactivity of penal laws, the offences as such having been regarded as punishable offences under the Danish law previously in force ;

(iii) that, notwithstanding that some of the offences charged were not disproportionate to the acts of sabotage which they were intended to punish, they could not be justified as reprisals, no prior notification having been given that they were to be applied as such ;

(iv) that, in any event, so-called " severe interrogation " and torture were clearly contrary to international law and therefore punishable offences ;

(v) that, accordingly, the convictions must be upheld. The Court said :

" Best did not enjoy diplomatic immunity in Denmark. Denmark had no government independent of Germany ; such government is the prerequisite of representation by persons of diplomatic status.

" In so far as concerns the retroactivity of the Danish statute No. 395 of July 1946, the arguments put forward cannot affect the validity of the statute ; moreover the statute is not retroactive : Firstly, the acts charged were at the time of their commission punishable offences by virtue of the national criminal code. Secondly, these acts were crimes against international law, which leaves to municipal courts the function of laying down punishments for such crimes, and the fact that

Case No. 146 *Contd.*

the municipal legislation which provided for an increase in the penalties previously laid down in the criminal code could not be enacted until after the Occupation has no bearing on the position of the accused.

" It was argued on behalf of the accused, and disputed by the Prosecutor, that the killings and demolitions in question were lawful as reprisals for one or more of the acts of the Resistance Movement, as they were intended to deter the latter from further activities and to comply with the conditions laid down by international law in order that an act may be recognized as a reprisal.

" It was stated before the tribunal that the individual acts of the Germans were preceded by acts of the Danish Resistance Movement, which acts entitled the Occupying Power to take reprisals in accordance with the laws and customs of war and belligerent occupation. The Court finds that the essential part of those of the German measures which were exclusively against property were not quantitatively excessive in relation to the preceding acts of the Danish Resistance Movement. With regard to the killings and those of the demolitions which involved and were known to involve loss of life and personal injury, the Court observes that the number of persons killed and injured does not exceed, according to the evidence before the Court, the number of persons killed or injured by the preceding Danish actions, with—possibly—isolated exceptions. It may be observed that the mere fact that the victims were innocent cannot in itself be regarded as decisive of the question of the legality of the German counter-measures.

" However, the Court does not on these grounds consider that the acts charged are permissible under international law. As was emphasized in the decision of the lower Court, the minimum requirement, in order that an act may become lawful as a reprisal, is that the opponent be notified that it is a reprisal for one or more acts on his part, or that such is apparent from the act itself. Otherwise the act lacks that purpose which alone can make it lawful. As has been said in the judgment, no announcement was made about the German acts. It is true that in some cases the retaliative nature of the acts might have been appreciated by well-informed circles of the Resistance Movement, or other particularly well-informed circles—which would not be sufficient—and in a few cases by the general public, by reason of the object against which the acts were directed, the method used, or the place of execution.

" Generally speaking, however, the acts alleged could not be recognised as being in the nature of reprisals for one or more acts of the Danish Resistance Movement, and the Danish population must have had the impression that they were the result of arbitrary action. The Court observes that it does not seem impossible that some of the German counter-measures, especially the murder and attempted murder of persons previously chosen, would not have been taken if the Germans had acknowledged that the measures taken by them were intended as reprisals.

"The Provincial Court finds that it must have been clear to the accused (two of whom had had a legal training) that the counter-terror as carried out by them was contrary to international law. The accused must have known that the mere fact that the order had been issued by the leaders of the German State could not possibly make it legal, and it must have been known to the accused that the German leaders had no respect for international and legal principles or humanitarian considerations. Although so-called 'severe interrogation' was officially permitted by the German authorities, we find this kind of interrogation to be contrary to generally accepted principles of law to such an extent that it must have been clear to the accused that it was contrary to international law. Four Germans and one Dane in German service had been killed before the eleven Danish civilians were killed. In accordance with the opinions expressed above with regard to reprisals, the Court upholds the convictions of the accused."

On appeal,

Held (by the Supreme Court): that the convictions of all the accused must be upheld. The Court said:

"Statute No. 395 of July 12, 1946, must, according to its wording, as well as its purpose, be considered as including all foreigners in German service, irrespective of whether or not they enjoyed diplomatic immunity at the time when they committed the offences referred to in the statute. Hence it follows that the rules of international law governing immunity cannot be relied upon for the benefit of any of the accused.

"The Court holds that the plea of the accused Best concerning the adoption by the United Nations of the Declaration of December 10, 1948, cannot affect the validity of the abovementioned statute. The Hague Rules on Land Warfare do not contain any rules concerning reprisals, and although it is recognized that to a certain extent reprisals may be taken against the civilian population in occupied territory, there is disagreement regarding the further conditions for their application. However, it must be regarded as generally recognized that reprisals taken by an Occupying Power against the civilian population are legal only as a last resort to keep law and order in the occupied territory, and that these acts of reprisal must be reasonably proportionate to the acts in respect of which they are taken. The accused therefore clearly acted in violation of international law in carrying out Hitler's order of December 30, 1943, which stated that Danish saboteurs should no longer be put on trial, but that retaliatory measures should be taken . . . immediately . . . although the situation in the country

Case No. 146 *Contd.* did not—even in the minds of the accused—indicate that such measures were necessary. Moreover, the acts taken were to a considerable extent of an inhuman nature and were unwarranted by international custom. . . . The Court holds that the rules governing reprisals cannot lead to impunity for the accused who must have been aware of the nature of the acts as being contrary to international law."

[Report: *Ugeskrift for Retsvaesen*, 1950, p. 453.]

Case No. 147

Belligerent Occupation—Treatment of Civilian Population—Safeguards in Criminal Trials—Trial of Members of Resistance Movement of Occupied Country—Whether Trial Judges Liable to Punishment.

PUBLIC PROSECUTOR *v.* LATZA AND OTHERS.

Norway, Supreme Court. December 3, 1948.

THE FACTS.—The accused, formerly members of a court-martial set up by the German authorities in occupied Norway, were charged with having sentenced members of the Norwegian resistance movement to death for the offence of failing to give information to the German authorities on acts of sabotage committed by Norwegian citizens. The Public Prosecutor contended that the accused were guilty of a war crime, not only for having inflicted punishment for an offence unknown to international law, viz. failure to give information on known acts of sabotage, but also for having failed to observe the minimum standards required for a fair trial, and more especially for having failed to supply the defendants with a written indictment and to allow defence counsel to appear at their trial. On behalf of the accused it was contended that there was no rule of international law which forbade the trial by the courts of an Occupying Power of citizens of an occupied country for failure to disclose the commission of acts of sabotage against the occupant, and that the trial conducted by them had not violated any rule of international law. The accused having been acquitted by the Court of First Instance and the Public Prosecutor having appealed,

Held: that the accused, in convicting Norwegian citizens for the offence of failing to disclose acts of sabotage and in failing to observe certain accepted standards of justice in connection with the trial, did not act in violation of international law and that the Public Prosecutor's appeal against their acquittal must accordingly be dismissed. The Court said:

"It has been contended that the proceedings before the German court were not genuine proceedings, mainly on the ground that evidence was adduced by means of reports from unnamed persons, such reports being read at the trial by the prosecutor, and also on the ground that the accused had not previously been acquainted with all the evidence. The proceedings before the ' court-martial ' are open to severe criticism, more particularly having regard to the fact that there was no written indictment, that no counsel appeared for the defence, that all the evidence was circumstantial (and hearsay), that the proceedings were very short and summary, and that confirmation of verdict and sentence by higher military authority seemed to have been secured before the trial in a manner which provided no guarantees for the persons on trial. The fact that the Germans desired to dispose of the cases before them as speedily as possible does not suffice to justify these shortcomings. . . . I cannot, however, attach decisive importance to these matters.

" The prosecution further contends that it is directly contrary to international law to enforce an enactment which imposes penalties for failure to denounce acts of sabotage, and in particular that an enactment of this kind constitutes an infringement of Article 44 of Hague Convention No. IV, of 1907. In my view neither this article nor any of the other provisions of the Hague Rules is directly applicable in the present case. I am of opinion that it would be more in accordance with the laws of humanity to prohibit punishment for failure to inform the authorities of the Occupying Power of acts of sabotage by patriotic resistance movements, but I would not be justified in saying that this has already become a rule of positive international law. . . ." [1]

[Report : *Norsk Rettstidende*, 1948, p. 1088.]

Belligerent Occupation—Services for the Occupant—Building of Barracks—Article 52 of the Hague Regulations. **Case No. 148**

PUBLIC PROSECUTOR *v.* H. EGGE.

Norway, Supreme Court. June 5, 1948.

(Stang C.J. ; Skau, Stenersen, Gaarder and Holmboe JJ.)

THE FACTS.—The accused had built a certain number of barracks for the Germans and had also executed some other work for them. The barracks were built for the housing of German soldiers in military camps within a military establishment. It was shown that the accused had been ordered by the German authorities to perform the work. The Public Prosecutor claimed that the performance of that work by the

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[1] The Chief Justice then dealt with and rejected the contention of the prosecution that the German Court was not entitled to inflict the death penalty for the offence of failing to denounce acts of sabotage.

Case No. 148 *Contd.* accused was a criminal act under Norwegian law, the accused not being under any obligation to perform it as it was beyond the scope of what the Occupying Power could demand in virtue of Article 52 of the Hague Regulations. The Court of First Instance, by a unanimous judgment, acquitted the accused. The Public Prosecutor appealed.

Held (*per* Judge Skau, for a unanimous Supreme Court): that the appeal must be dismissed. The Supreme Court accepted the reasons given by the Court of First Instance.

[Report: *Norsk Rettstidende*, 1948, p. 470.]

Belligerent Occupation—Taking of Hostages—Legality of.

See Case No. 124 (*In re Bellmer*).

C—WARFARE AT SEA

IV.—Prize Law

Case No. 149 **Prize Law—Visit and Search—Conditions of—Position of Customs Officers—Contraband—Seizure of—Enemy Destination Possible though Not Established—Burden of Proof—Effect of Absence of Formal Declaration of War—Hostilities between Egypt and Israel in 1948—Suez Canal Convention, 1888—Effect on Belligerent Rights of Egypt.**

THE FLYING TRADER.

Egypt, Prize Court of Alexandria. December 2, 1950.

THE FACTS.—On November 15, 1948, the authorities at Port Said searched the ship *Flying Trader* and seized 38 tractors shipped by Show Wallace and Company, but without any indication of the consignee, from Bombay via New York. It appeared from the *procès-verbal* of the Egyptian Prize Commission at Port Said that the cargo, although described as tractors, comprised in fact armoured cars, made of heavy steel, with gun-pits ready to mounts guns, etc. There were 50 such vehicles shipped on April 12, 1948, on the *Flying Arrow* (a ship which belonged to the same shipping company as that which owned the *Flying Trader*) sailing from New York to Tel Aviv. Whilst discharging its cargo at Tel Aviv, the *Flying Arrow* was attacked in port and was not able to unload more than 12 vehicles. She left port and continued her voyage to Bombay with the remaining 38 vehicles. These were discharged at Bombay, where they were transhipped on to the *Flying Trader*, the manifest showing that they were destined for New York.

In January 1949 Mr. Ahmed Bey, Advocate, appeared on behalf of the following: (1) Federal Insurance Company of New Jersey; (2) United States Fire Insurance Company; (3) The Insurance Company of North Africa. These Companies had an interest as assurers of the vehicles seized, the first one as regards half, and the second and third as to one quarter each. They requested the release of the tractors.

The Court, by an order made on February 4, 1950, directed an examination by experts ("transport sur les lieux") who found that the vehicles were armoured cars each capable of carrying a dozen soldiers.

Held: that the seizure of the tractors was valid and constituted good and lawful prize. The Court said:

"The claimants ask for the release of the thirty-eight tractors seized by the Egyptian authorities aboard the *Flying Trader* when this ship was passing through the Suez Canal bound for New York. The claimants contend that this cargo was neutral at all times: neutral in origin, neutral as regards the mode of its transportation, neutral as to its destination, and neutral as to its consignee. Their argument runs as follows: 1. The seizure of the vessel was null and void, as were also the measures which followed, such as the discharge and confiscation of the cargo; 2. the voyage of the *Flying Trader* could not be regarded as a 'continuous voyage' and, in consequence, the cargo could not be considered as contraband liable to confiscation; 3. the cargo did not have an enemy destination and consequently could not be declared contraband.

"They also argue that Egypt has no right to interfere with the freedom of passage through the Suez Canal or to take prizes there, inasmuch as the Suez Canal Convention of 1888 grants to all nations the right of passage, a right which must be considered in the nature of a servitude. Further, the claimants maintain that the illegality of the measures taken by the Egyptian Government is also proved by the fact that visit and search is a belligerent right, and it is said that the Egyptian authorities are not entitled to exercise this right in respect of a cargo which is both neutral in origin and neutral as regards its final destination. The object of visit and search, so they argue, is to ascertain the nationality of the ship, the nature of the cargo, and its final destination. They say that according to the rules of international law, the ship's papers, if authentic, should alone be taken into account by the authorities which carry out visit and search, and that it is on the basis of such papers that the authorities should determine their attitude as regards the ship and its cargo. Finally they maintain that the Egyptian authorities should, on mere sight of the papers, have stopped at that point, and not proceeded to search, seize and unload the cargo. For these reasons the claimants

Case No. 149 *Contd.*

contend that the search and seizure were invalid, and also the confiscation which followed.

"International law grants to every belligerent State the right of visit and search in order to prevent neutrals from trading with the enemy. The right of search is exercised by the official forces of the belligerent whether these are ships or military aircraft. In the ports and rivers of a belligerent, such search may validly be carried out by customs officers. It appears from the *procès-verbal* of the Commission of Enquiry of 15 November 1948 that the Commission boarded the ship and observed the presence of a cargo of 38 vehicles described as 'tractors'. These tractors had previously been shipped on 12 April 1948 on board the *Flying Arrow*, a ship which belonged to the same shipping company; the vehicles whilst on that ship were destined for Tel Aviv. The right of capture differs from that of visit and search in that the former only arises in the event that there are reasonable grounds for the suspicion that the cargo is contraband and liable to confiscation. It can hardly be doubted that the customs authorities were justified in seizing the tractors when it appeared to the officers that the description of the tractors given on the ship's papers did not correspond with their actual character, and that they were in fact contraband. Accordingly, the seizure was carried out according to law.

"The second point made by the claimants is that the voyage was not 'continuous'. This argument runs as follows: the cargo cannot be considered as contraband, for, so they say, the tractors seized—whether they be regarded as absolute or relative contraband—must, in order to be liable to confiscation, have an enemy destination, that is to say, they must have been shipped, either directly or indirectly, to the enemy. The claimants say that to argue that Palestine was the final destination of the tractors—just because part of the cargo was unloaded at Tel Aviv before the commencement of the war—is to put forward an argument devoid of all foundation. They say this for the following reason: there is nothing to show that the voyage from Bombay to New York was interrupted by touching port in Palestine, or that the tractors could have been re-shipped for Palestine after their return to New York. Furthermore, they allege that the existence of old markings on cargo re-shipped to a neutral port does not prove enemy destination. From an examination of the papers of the *Flying Trader*, it appears that this ship left Bombay bound for New York via Genoa. The latter port appears on the black list as being the principal base for contraband traffic destined for the Zionists. It would, therefore, have been easy to get this cargo to the Zionists after unloading it at Genoa. The owners of the cargo have not appeared to request its release, but three insurance companies have appeared who claim that they have paid its value to certain individuals. The Court has invited these companies to produce the bills of lading and the insurance policies in order that the owner of the cargo at the time of shipment may be known ; also the Court has requested information concerning the consignee at Tel Aviv and any relevant correspondence. The said companies have not produced any such documents. They have merely produced one copy of the bill of lading relating to the trans-shipment on to the *Flying Trader*, together with a photographic copy of the bill of lading which shows certain discrepancies with the original of that document. Indeed the latter bears in the column set aside for the consignee the words ' to order ', whilst the copy bears in that column the name of an individual. The original indicates that there were two copies, whilst the photographic copy indicates there were three. These discrepancies are substantial, and undermine confidence in the documents produced.

" The burden of proof is upon the claimants, according to Article 16 of Law No. 32 of 1950, the principles of international law, and case-law in matters of prize. It is for them to show that the cargo is ' innocent '. The reason for this rule is that the captor is clearly not in a position to examine the actual relations between the trader and his customer residing in enemy or neutral territory. On the other hand the trader may offer explanations of matters which have roused the suspicion of the authorities. The Prize Court can only admit positive evidence produced by the claimant, and it is necessary for the latter to establish not only that the cargo was shipped to neutral territory, but also to prove that in no way could the cargo have reached enemy territory after its arrival in neutral territory. (See *The Louisiana* (1918), a decision of the British Admiralty Court.)

" The claimants, in an effort to establish a non-enemy final destination, allege that the voyage from Bombay to New York could be, and was, carried out direct, without touching any port near Palestine, that enemy destination is not a matter of intention, but a question of fact (as stated by Lord Parmoor in a Privy Council case, *The Norne*), and that the contraband character of cargo, under the doctrine of continuous voyage, is always a question of fact.

" The Court is in general agreement with these arguments. It is for the claimants to prove, by producing documents, the non-continuous character of the voyage and affirmatively to show that the cargo was never delivered to the Zionists. However, the suspicions entertained by the Egyptian authorities at the time they seized the cargo are confirmed by the fact that the claimants have not produced the documents asked for by the Court, and by the discrepancies between the original bill of lading and the photographic copy which were produced. The unanimous jurisprudence of Prize Courts of all countries

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holds that the words 'to order' in a bill of lading, and the failure of the claimants to produce documents in their possession, create a sufficient presumption of the enemy destination of the cargo. This presumption can be rebutted; however, the claimants have failed to rebut it (see Colombos, p. 182, note 184 *et seq.*). It cannot be doubted that these armoured cars were, from their first shipment, destined for the Zionist forces; for it is a fact that hostilities already existed in Palestine in the months of February and April 1948.

"The claimants argue that no state of war existed between Egypt and the Zionists; that Egypt had merely embarked on a punitive expedition with a view to protecting the lives and property of Egyptians and Arabs from armed attacks by Zionist forces which sprang into existence after the termination of the British Mandate; and that Egypt was not, therefore, in a state of war so long as the military operations in Palestine had not assumed the character of a conflict between States. In the absence of a conflict having this legal character, Egypt could not (it is argued) exercise any belligerent right against neutral vessels or seize their cargoes; even less (it is said) could she violate the right of free passage granted to all nations in peace and in war under the Convention of 1888.

"The Treaty of Versailles conceded to Palestine a semi-international personality and placed her under Mandate A. This Mandate, however, did not confer upon Great Britain any sovereign rights over Palestine territory. When the League of Nations dissolved, the Mandate disappeared also. Thereafter followed the sanguinary conflicts between Arabs and Jews which caused the General Assembly of the United Nations to intervene and to proclaim, on 29 November 1947, the partition of Palestine between two States, one Arab and one Jewish. The Arab League recognized the Arab State, and admitted it as a member of the League and as an ally.

"On 15 May 1948 Egypt proclaimed its armed intervention in Palestine with a view to restoring law and order, and with the object of putting an end to acts of violence committed by the Zionist bands. This was done in collaboration with the other members of the Arab League and in their capacity as allies of a State Member of the League. The same evening the Zionists proclaimed the State of Israel. The U.S.S.R. and the U.S.A. recognized this State and took the position that the Provisional Government thereof was the effective Government of a new *de facto* State. The conflict between Egypt and the Zionists is, therefore, a conflict between two States, at least in the eyes of the United States of America. This conflict presents all the elements of a true war according to public international law. The United States cannot therefore avoid the consequences of that recognition in so far as concerns the application of the rules of peace and war as accepted under international law; nor can the United States deny to Israel the right to proceed to search, seizure, and taking in prize, *vis-à-vis* its enemies, any more than it can deny to States members of the Arab League, of which Egypt is a member, the exercise of similar rights *vis-à-vis* Israel; for, in an armed conflict, the laws of war apply impartially to both belligerents.

"It follows, therefore, that Egypt has incontestably a right of seizure *jure belli.* There remains the question of Egypt's rights of seizure in time of war in the Suez Canal.

"So far as the 1888 Convention is concerned, the argument of the claimants boils down to this: Egypt cannot, under the pretext of ensuring her own defence, and the maintenance of public order, commit acts in the Canal which are essentially acts of war (such as visit, search, and seizure of neutral vessels) unless it is proved that such acts are really necessary to ensure the defence of Egypt and the maintenance of public order; for Article 10 of the Convention is merely an exception to Articles 4, 5, 7 and 8 and does not authorize acts of this nature. Article 11 provides: 'The measures which shall be taken in the cases provided for by Articles 9 and 10 of the present treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article 8 is prohibited.' Article 4 precludes Egypt, even in its capacity as local sovereign, from committing, within the Canal, any act of hostility, or exercising any right of war, or any act having for its object the obstruction of the free navigation of the Canal and its ports of access, as well as within a radius of three marine miles from those ports.

"Further, under the Treaty of 1936, Egypt no longer retains the sole right of defending the Canal, but shares that right with Great Britain, which, moreover, bears the greater share of the burden. Article 1 of the 1888 Convention provides: 'The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently, the high contracting parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

"'The Canal shall never be subjected to the exercise of the right of blockade.'

"Article 10 states: 'Similarly, the provisions of Articles 4, 5, 7, and 8 shall not interfere with the measures which His Majesty the Sultan and His Majesty the Khedive, in the name of His Imperial Majesty and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order. In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this article provides, the signatory Powers of the Declaration of London shall be notified thereof

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by the Imperial Ottoman Government. It is likewise understood that the provisions of the four articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.' It is, therefore, clear that the 1888 Convention, which was not signed by the United States, forbids any hostile act or any act having the object of interfering with the free navigation of the Canal. The Convention, however, makes three exceptions to this rule: (*a*) the defence of the Canal (Article 9); (*b*) the defence of Egypt and the maintenance of public order; (*c*) the defence of the possessions of the Ottoman Government situated on the eastern side of the Red Sea.

"It falls to this Court to interpret the expression 'the defence of Egypt and the maintenance of public order', a situation which involves the non-application of Article 4 of the Convention.

"The Court has already ruled that Egypt was truly a belligerent State possessing the right of capture *jure belli*. It follows that Egypt has in this connexion the right to take any measures necessary for its defence. The exercise of this right in no way runs counter to the provisions of Articles 4, 5 and 7, for the prohibitions contained in those articles cannot interfere with the natural right of a State to preserve its own existence, a right which cannot be the subject even of express renunciation. Egypt is the sole judge of the existence of a state of danger menacing her existence and rendering necessary certain acts referred to in Article 4. All that the Convention requires, in the event of the carrying out of particular measures, is notification to the Powers signatory to the Declaration of London of 17 March 1885. Every armed conflict to which Egypt is a party, and especially a conflict with its neighbours, raises inevitably the question of the defence of its own territory, whatever the origin of the hostilities may be. Its entire territory, land or sea, becomes, in the eyes of international law, a theatre of war authorizing the enemy to commit such acts of war therein as it may judge expedient (Oppenheim, *International Law* (1944 ed.), Vol. II, p. 187). There flows from this the necessity of repelling aggression, whether by repulsing enemy attacks, or in preventing such attacks from taking place, which includes interrupting the means of reinforcing such attacks.

"The provisions of Article 11 of the Convention, which states that measures taken by Egypt and Turkey in the exceptional cases contemplated by Articles 9 and 10 must not interfere with the free use of the Canal, cannot be construed as a restriction upon the rights of Egypt. The signatories of the Convention intended in this Article to confirm what is said in

Article 1 about free passage through the Canal in time of war and peace; but reasonable and necessary measures taken by Egypt do not interfere with such passage.

"The Treaty of 1936 signed by Egypt and Great Britain does not mean that the latter can take away or restrict the natural right of Egypt to exercise her sovereignty over the region traversed by the Canal nor the rights conferred upon Egypt by the Convention itself.

"The contention of the claimants that the visit and search and seizure were invalid is without foundation.

"For these reasons the Court declares the capture of the tractors good and lawful prize."

[Report: *Revue égyptienne de Droit international* (1951), Vol. 7, p. 127.]

Prize Law—Contraband—Enemy Character of Cargo—Test of—Domicile or Nationality—Sale of Cargo after Capture—Whether Capable of being set up against Captor. **Case No. 150**

The Hoegh de Vries.

Egypt, Prize Court of Alexandria. January 7, 1950.

The Facts.—On December 5, 1947, the ship *Hoegh de Vries* discharged at Port Said 56 sacks of black pepper valued at £998,750, produce of Singapore, to the order of the Commercial Bank of Palestine at Haifa. The goods were deposited at the Customs House in transit. On June 5, 1948, they were seized.

Held: that the seizure was valid. The Court said:

"The goods are the property of one Abdul Raouf Karman of Haifa, who still resides in that town, as is shown by the contract presented by him dated 25th July 1948 concerning the sale of the goods seized to Maison Said Torba of Beirut. On the assumption that the claimant is an Arab, as he maintains, the fact of residence in enemy country makes him an enemy. At the London Conference of 1909, every country supported its own system and the question was not resolved, but it was decided only that the hostile or neutral character of goods should be determined by the enemy or neutral character of the owner, without specifying whether such character was to be based on his nationality or his domicile.

"The Anglo-Saxon system is based on the idea that the purpose in hand is the capture of all goods with an enemy destination. If, therefore, an owner is a neutral residing in enemy territory the goods are a source of wealth to the enemy State. The Egyptian Prize Courts have, in general, adopted the British rules in prize matters, and especially in so far as concerns the character of the goods being determined according

Case No. 150 *Contd.* to the domicile of the owner, it being agreed that this rule is the one most generally accepted, and that it applies to goods entering enemy territory and supplementing the enemy's resources.

"The claimant is domiciled in Haifa and also resides there. This port is in enemy country and his goods must be regarded as enemy property and subject to confiscation. The sale of the goods by the claimant on 25 July 1948 to Maison Said Torba of Beirut cannot be taken into consideration, for the seizure took place on 5 June 1948 when the goods were still the property of the claimant. Any disposal of the goods subsequent to seizure cannot affect the rights of the captor."

[Report: *Revue égyptienne de Droit international* (1950), Vol. 6, p. 225.]

Case No. 151 **Prize Law—Enemy Destination—Cargo Shipped before Commencement of Hostilities to Persons who later became Enemies —Continuous Enemy Ownership—Later Occupation by Enemy of Place of Seat of Business of Consignee.**

THE TALTHYBIUS.

Egypt, Prize Court of Alexandria. February 4, 1950.

THE FACTS.—On April 24, 1948, the *Talthybius* discharged at Port Said, in transit for Palestine, 16 cases of yarn valued at £2,170, shipped by Lockwood Textile Company of New York to the order of Messrs. Cherif and Alamy of Jaffa. This cargo was seized on June 5, 1948. A claim was made on behalf of Messrs. Cherif and Alamy for the release of the cargo. In support of this claim there was produced the invoice, an advice note addressed to Messrs. Cherif and Alamy by Barclay's Bank of Jaffa, dated April 3, 1948, stating that the purchase price had been paid, a copy of a letter addressed by the Governor of Gaza to the Customs Administration requesting the release of the cargo, as well as the release of another cargo aboard the ship *Celtica*, which cargo also belonged to Messrs. Cherif and Alamy, the certificate of appraisal of the goods presented to the Government of Palestine on March 30, 1948, the delivery order issued in the name of the claimants by the maritime agency William Stapledon of Port Said dated February 2, 1949, an order which a shipping company only gives against a bill of lading, the ship's manifest bearing the claimants' name, and a certificate of insurance of the goods also in his name.

The claimants stated that the bill of lading and the original bill of sale were annexed to the file concerning the capture of the ship *Celtica*, a capture which included 136 bales of cotton. These, it was alleged, were later released, and it had not been possible to retrieve the relevant papers on the file in question.

Held : that the cargo must be released. The Court said :

" The documents produced by the claimants are sufficient to prove its right of ownership in the cargo. It is also established that the claimants are Arabs, belonging to the Arab part of Palestine, and that they took refuge in Egypt and there reside, as appears from the letters they have written to the Prize Court. The captured cargo is not, therefore, enemy property. The fact that the cargo was shipped to its destination from Haifa does not alter the situation, in view of the special position of Palestine and the division of its population into two opposed camps, one consisting of Arabs, and therefore allies, and the other of non-Arabs settled in areas subject to enemy control. The cargo, shipped to an Arab ally and consigned to a port which remained Arab up to the date of seizure, although this port was later occupied by the enemy, cannot be considered as contraband so long as the cargo remained the property of the Arab consignees up to the day of capture ; for its true destination was not an enemy destination. For these reasons the Court declares the capture invalid and orders the release of the cargo."

[Report : *Revue égyptienne de Droit international* (1950), Vol. 6, p. 227.]

Prize Law—Enemy Character of Merchant Vessel—Conclusiveness of Enemy Flag—Vessel Owned by Enemy Corporation—Enemy Corporation Owned and Controlled by Neutral Corporation—Enemy Flag Accepted under Pressure.

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